

Roles of Due Process and Full Faith and Credit in Choice of Law

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THE ROLES OF DUE PROCESS AND FULL FAITH AND CREDIT IN CHOICE OF LAW*

Frederic L. Kirgis, Jr.[†]

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In a recent Article in the *Cornell Law Review*, Professor James A. Martin asserted that due process concepts do not provide an adequate theoretical basis for constitutional limitations on choice of law, nor do they sufficiently explain the results in the Supreme Court decisions purporting to apply to those concepts.¹ He states that constitutional analysis of this problem should proceed from the full faith and credit clause, and focus on the competing interests of the jurisdictions involved. Thus, without making clear whether he is referring to the law as it is (what the Supreme Court

* I am grateful for helpful comments by my colleague Harold W. Horowitz, who does not fully agree with the approach taken here.

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¹ Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976) [hereinafter cited as Martin].

has done, even though it may not have said so), or to the law as it should be, he concludes:

The forum may apply its law to the substantive questions of a case whenever (a) the party resisting application of that law has acted in the forum or derived from the forum relatively direct benefits, or (b) there is some weaker connection between the defendant and the forum, and the forum's interests are relatively strong compared to interests of other states that would be dis-served by the application of forum law.²

The implication, of course, is that if neither (a) nor (b) is met, the forum may not apply its own law. I doubt that this either accurately reflects what the Supreme Court has done or formulates the law as it should be.³

I

DUE PROCESS

A. *Power and Fairness*

Professor Martin has treated due process exclusively as a fairness doctrine, arguing that it is too elusive a tool for choice-of-law questions when formulated in terms of avoiding unfair surprise or of effectuating a party's justified reliance on a body of law.⁴ Due process, of course, does reflect fundamental notions of fairness, particularly in its procedural context. But fairness is not its only procedural aspect, nor is due process solely a procedural doctrine. In its procedural form, the personal jurisdiction cases demonstrate that due process has a power element as well as a fairness element. Jurisdictional restrictions

² *Id.* at 230.

³ The present discussion, like Professor Martin's, does not focus on privileges and immunities, equal protection, or the commerce clause as constitutional choice-of-law limitations. A comprehensive treatment of the subject could not ignore those doctrines. As courts adopt more "modern" choice-of-law rules stressing domicile and forum law, the role of these constitutional doctrines as choice-of-law restraints will increase. See Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960); Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960); Horowitz, *The Commerce Clause as a Limitation on State Choice of Law Doctrine*, 84 HARV. L. REV. 806 (1971); cf. Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 148-49 (1973).

⁴ Martin, *supra* note 1, at 188-91.

are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.⁵

Similarly, substantive due process restricts the ability of a state to tax or to impose tax collection responsibilities, when it tries to reach persons or transactions outside its borders.⁶ In this context, too, the doctrine reflects a concern not only with fairness, but also with the arrogation of power by a single geopolitical entity within the United States. Acquisitiveness should have some limits wholly apart from whether the persons affected might have expected it, or whether interstate commerce might be unduly burdened by it, or whether some other state would be more interested in the matter. The catchword often used in the taxation cases is "nexus"—denoting the requirement that there be some genuine link between the state and the taxpayer to justify the state's exercise of the power to tax or to require collection of a tax.⁷

Arrogation of power might be thought a less serious problem when a state assumes authority to supply a rule of decision for private litigation than when it assumes authority to hear a dispute or to impose a tax. But a considerable exercise of power is involved in asserting authority to attach one's own normative standard to specific persons or events. We ought to be reasonably certain that the state has some basis for exerting this power. This is distinct

⁵ *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). See also *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). As Professor Kurland said after *Hanson*: "[T]he concept of territorial limitations on state power is still a vital one." Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 623 (1958).

⁶ Substantive due process has been recently applied by the Supreme Court to limit the power of a state to impose tax collection obligations on a nonresident. See *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). See also *Aldens, Inc. v. Packel*, 524 F.2d 38, 42-44 (3d Cir. 1975), cert. denied sub nom. *Aldens, Inc. v. Kane*, 96 S. Ct. 1684 (1976) (due process as choice-of-law restriction).

⁷ See, e.g., *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 464 (1959); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 445 (1940); cf. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756-58 (1967). The power element appears clearly in *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954): "[D]ue process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." See also *Griffin, Inc. v. Tully*, 404 F. Supp. 738, 748 (D. Vt. 1975).

from our concern that the state should treat individuals fairly,⁸ and also distinct from our concern (expressed in the full faith and credit clause) that the specific interests of other states be respected. In all cases, a minimum, threshold justification for asserting normative authority should exist before we ask whether it is unfair, or invades another state's interest, to exercise the power.

If this is a legitimate due process concern, one must ask what gives a state authority to impose its normative standard. Arguably, the focus should be on the state's interest in effectuating the policies reflected in its rule by applying the rule to the facts before it—an interest-analysis standard.⁹ Unfortunately, the legislative and common-law policies underlying specific rules are very often unarticulated; hence, courts applying interest analysis often speculate and, one sometimes suspects, engage in some creative juggling of policies to reach the desired result. To the extent that this process favors choosing forum law, as it generally does, a due process power limitation should curb any excesses. The power limitation cannot do so unless it is based on relatively observable facts that establish a link between the state and the persons or transactions to be governed by its rule. Because states are defined territorially, and because most people are comfortable with the proposition that it is a state's legitimate business to attach rules to matters or persons having a genuine connection with its territory, a power limitation based on territoriality makes sense. If the rule the state seeks to impose applies to an event within the state's territory, or to a person who has some relatively stable relationship with the state (such as residence, domicile, or place of business), an observable link exists to justify the exercise of power. The cases support such a due process power standard as a complement to the fairness standard.

B. *The Leading Due Process Cases*

Home Insurance Company v. Dick:¹⁰ A fire insurance policy, issued in Mexico by a Mexican insurance agency to a Mexican domiciliary, covered a tug while it was in designated Mexican waters. The policy was expressly made subject to Mexican law, the premium was paid in Mexico, and the loss was "payable in the City

⁸ The traditional fairness standard is that it ought not surprise the persons affected or impose undue burdens on them.

⁹ See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 43-44, 75-76 (1958), reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 232-33, 271 (1963).

¹⁰ 281 U.S. 397 (1930).

of Mexico in current funds of the United States of Mexico, or their equivalent elsewhere.”¹¹ The loss was payable to Dick (who was not the original holder of the policy) and the Texas and Gulf Steamship Company, as their interests might appear. The policy provided that no suit could be brought under it after one year from the date of the loss, as permitted by Mexican law. Before any loss occurred, the policy was assigned to Dick, a Mexican resident, though a Texas domiciliary. He remained a Mexican resident until after the tug was destroyed by fire. More than a year after the loss, he sued on the policy in a Texas court, relying on a Texas statute that invalidated any provision limiting the time for suit to less than two years. Jurisdiction was obtained by garnishment against the Texas agents of two New York insurance companies that had reinsured the loss by arrangement with the Mexican company.

The United States Supreme Court stressed that the Texas statute attempted to regulate contractual rights and obligations; hence, it was not a mere statute of limitations. Since Texas had no contact with the transaction except as the assignee’s domicile, it was held to be “without power”¹² to affect the terms of the contract:

Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law.¹³

The full faith and credit clause was not involved, because Mexico was not a state within the meaning of that clause.

Watson v. Employers Liability Assurance Corp.:¹⁴ An insurance policy, negotiated and issued in Massachusetts, and delivered in Massachusetts and Illinois, insured the Toni Company against liability arising from the use of its hairwaving product. The policy covered losses from personal injuries to Toni users anywhere in the United States, its territories, or Canada. It contained a provision, valid in

¹¹ *Id.* at 403.

¹² *Id.* at 408.

¹³ *Id.* In view of this language (and of the literal wording of the due process clause), it might be argued that the holding is limited to cases in which there is an actual garnishment, attachment, or execution against property. If that were the case, due process would not be a constraint applied to choice-of-law itself, but to choice-of-law plus property seizure under court order. Such a reading of *Dick*, however, seems too narrow in light of the broader use of due process in the personal jurisdiction context, and in light of the direct or prospective effect on property when the forum makes a choice of law imposing or denying liability.

¹⁴ 348 U.S. 66 (1954).

Massachusetts and Illinois, barring direct action against the insurance company until final determination of Toni's liability. A Louisiana resident who had used the product in Louisiana sued the insurance company in Louisiana under that state's direct-action statute, without any prior determination that Toni was liable. The United States Supreme Court held that Louisiana could apply its direct-action statute consistently with due process. The Court said that in *Dick*

Texas was denied *power* to alter the terms of an insurance contract made in Mexico between persons then in that country, covering a vessel only while in Mexican waters, and containing a provision that the contract was to be governed by the laws of Mexico. Thus, the subject matter of the contract related in no manner to anything that had been done or was to be done in Texas. For this reason, Texas was denied *power* to alter the obligations of the Mexican contract. But this Court carefully pointed out that its decision might have been different had activities relating to the contract taken place in Texas upon which the State could properly lay hold as a basis for regulation.¹⁵

Clay v. Sun Insurance Office, Ltd.:¹⁶ A person then residing in Illinois purchased a "Personal Property Floater Policy (World Wide)" containing no territorial limits on coverage and containing no choice-of-law clause. The policy contained a one-year limitation of action clause, which was valid under Illinois law. After moving to Florida, the insured lost his personal property. Under Florida law, the one-year limitation clause was invalid. The United States Supreme Court held that Florida did not violate due process by applying its own law. *Dick* was distinguished on the ground that "activities" in Texas were "wholly lacking"¹⁷ whereas in *Clay*, Florida had "ample contacts with the present transaction and the parties."¹⁸

C. *Synthesis*

The common threads running through these three decisions are: (1) the search for a more-than-minimal contact or relationship

¹⁵ *Id.* at 71 (emphasis added).

¹⁶ 377 U.S. 179 (1964).

¹⁷ *Id.* at 181-82.

¹⁸ *Id.* at 183. The Court also distinguished *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934), on the ground that the forum state activities in that case were thought to be too slight and too casual to justify application of forum law. *Delta & Pine* was not distinguishable on its facts. See note 59 *infra*.

with the forum state to justify assertion of that state's power to allocate rights and revise obligations in ways contrary to those agreed upon by the parties; and (2) the attempt to find some assurance that the party who stands to lose under the chosen law has assumed the risk that contacts or relationships sufficient to satisfy the power requirement might take place in that state.¹⁹ The resulting standard—power tempered by fairness—is fundamentally a due process standard.²⁰

If one leaves power out of the due process equation, as Professor Martin does, then the concept of fairness to individual parties, absent further definition, does not provide predictable, principled standards for choice-of-law determinations. The only standard left is deference to the interests of other states or nations—essentially a full faith and credit standard, extended by analogy when the other sovereign is a nation. To demonstrate this, Professor Martin presents two cases: *Skiriotes v. Florida*²¹ and *Banco Nacional de Cuba v. Sabbatino*.²²

In *Skiriotes*, the Supreme Court held that Florida could apply its criminal sanction against those using certain equipment to take sponges from more than three nautical miles off the Florida coast, when the defendant was a Florida citizen engaged in a Florida-centered business of deep sea diving for commercial sponges. The significant difference between this holding and *Dick*, Professor Martin asserts, is that the high seas locus of the activities in *Skiriotes* eliminates the foreign contacts present in *Dick*, but does not add significant domestic contacts.²³ *Skiriotes* does eliminate the foreign contacts, but it is something of a mystery why the defendant's Florida residence and Florida business (to say nothing of the continuum of the sponge fishery within, as well as outside, the three mile limit) do not add significant domestic contacts to the *Dick*

¹⁹ The decisions do not support the argument that the explanation for the due process decisions is the interest of the forum in applying its own law. See text accompanying notes 39-43 *infra*.

²⁰ Professor Martin asserts that the attribution of importance to the location of events is linked to state sovereignty over the events—which he identifies with full faith and credit rather than with due process. Martin, *supra* note 1, at 200. But full faith and credit relates to avoidance of excessive legal provincialism in a federal system, not to state sovereignty over events. See text accompanying notes 60-62 *infra*.

The *Dick* case, with its due process rationale, has never been seriously questioned in subsequent Supreme Court decisions, though it has been distinguished in cases like *Watson* (377 U.S. at 182), and *Clay* (348 U.S. at 70-71).

²¹ 313 U.S. 69 (1941).

²² 376 U.S. 398 (1964).

²³ Martin, *supra* note 1, at 197.

situation.²⁴ Moreover, to view the *Skiriotes* case as Professor Martin does ignores the fact that the Supreme Court stressed that it was dealing with a question of state *power*—a due process concept—in the context of a state's extraterritorial reach.²⁵

Professor Martin then turns to *Sabbatino*, correctly treating it as a choice-of-law decision. In effect, the Supreme Court applied the act-of-state doctrine as a "super choice-of-law rule" which (1) chose Cuban law to determine the validity of the Cuban taking in Cuban waters of sugar beneficially owned by Americans; (2) conclusively presumed the taking valid under Cuban law; and (3) precluded application of the public policy escape device that might have prevented Banco Nacional from relying on Cuban law in an American court.²⁶ It is true, as Professor Martin states, that the taking would have violated due process had it been perpetrated by the United States government, and that the Cuban taking at least runs counter to the "spirit" of due process.²⁷ One can only wonder, however, how that leads to the statement:

Thus, it perverts the concept of due process to hold that the fifth amendment's due process clause actually *required* the holding in *Sabbatino* on the ground that Cuba was the only country with the requisite contacts.²⁸

Surely due process did not require the holding in *Sabbatino* on that ground or any other. The Supreme Court never implied that it did. It based its holding on the apprehension that any other result might interfere with the handling of foreign affairs by the Executive Branch, and on a feeling that it would be improper for the world's largest capital-exporting nation to apply its own legal standards, inevitably considered parochial by some nations, to judge the propriety of expropriation by third world countries.²⁹ Neither basis rests on due process premises.

Under *Dick*, *Watson*, and *Clay*, an American court could have decided against Banco Nacional without violating due process, for at least two reasons: (1) Were it not for the act-of-state doctrine (which has little or nothing to do with due process), an American

²⁴ See *Skiriotes v. Florida*, 313 U.S. 69, 75-79 (1941).

²⁵ *Id.* at 79.

²⁶ See generally Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. OF TRANSNAT'L L. 175 (1967); Kirgis, *Act of State Exceptions and Choice of Law*, 44 U. COLO. L. REV. 173 (1972).

²⁷ Martin, *supra* note 1, at 198.

²⁸ *Id.* (emphasis in original).

²⁹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423-25, 427-37 (1964).

court could have resorted to the public policy escape device, simply refusing to enforce the Cuban plaintiff's claim for affirmative relief.³⁰ In *Dick*, the Supreme Court left the door open for just that.³¹ (2) The beneficial owners of the expropriated sugar were Americans, and the expropriation was in retaliation for United States policies toward Cuba. After the expropriation, the Cuban governmental instrumentality resold the sugar to the original American buyer and sent the documents of title to an agent in the United States for delivery to the buyer. Consequently there were many contacts with the United States, and it would not seem unfair to hold that the Cuban government assumed the risk that federal law in the United States might apply when it expropriated and resold the sugar. Only foreign policy considerations prevented the application of American law.³²

D. *Due Process Formulation*

It is important to state just what limits due process provides. I do so with some diffidence especially since *Dick* was decided within a choice-of-law system that has been increasingly abandoned. Nevertheless, the guidelines below are offered, not only as a synthesis of the due process limits reflected in existing decisions, but also as workable standards for future cases. They incorporate notions of power as well as fairness. I have drawn in part on Professor Martin's perception that derivation of benefits from the forum may give it sufficient justification to apply its own law, although I would not apply the "benefits" test exactly as he would.³³ Moreover, this derivation of benefits from the forum standard seems to go to due process fairness, not (as Professor Martin argues³⁴) to full faith and credit.

³⁰ Banco Nacional was the plaintiff, seeking to recover for conversion of the documents of title to the sugar. *Id.* at 406.

³¹ Home Ins. Co. v. Dick, 281 U.S. 397, 410 (1930). It has been pointed out that the public policy refuge is often just an application of forum law in disguise. See Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956). But this is not necessarily the case when the forum simply refuses to enforce an affirmative claim based on a foreign law that is repugnant to the forum's fundamental notions of justice or morality, as would be the case in *Sabbatino*.

³² As Professor Martin notes, Congress in the second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1970), reversed the *Sabbatino* result on the narrow facts of the case. The ensuing due process attack on the Hickenlooper Amendment was not made on choice-of-law grounds. See *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968).

³³ Compare Martin, *supra* note 1, at 207-08, with text accompanying note 58 *infra*.

³⁴ Martin, *supra* note 1, at 203.

The forum must have a reasonable basis for applying its own law.³⁵ Specifically, a reasonable due process basis exists to provide the rule for a specific issue in a dispute, whether or not the forum has an interest (in the interest-analysis sense) in applying its own law, only if:

(1) Any transaction, conduct, or occurrence closely connected with the claim for relief or defense on that issue has taken place in the forum, or the party resisting application of forum law has some nonminimal relationship with the forum that is reflected in the content or policy of the forum's rule;³⁶ and

(2) application of forum law would not be manifestly unfair to the party resisting it. Manifest unfairness exists when the resisting party has not done anything (personally or by an agent) in the forum to which the specific forum rule attaches significance, if the rule would adversely affect substantial interests of that party protected by a conflicting rule in another relevant jurisdiction,³⁷ and if:

(a) the issue arises from a transaction or conduct from which the resisting party expected to receive some material benefit, but no substantial part of the actual or anticipated benefit is derived (or could reasonably be expected to be derived) from sources or occurrences within the forum or, perhaps, from a state having substantially the same rule as the forum; or

(b) no material benefit was expected, and the resisting party would not have reasonably foreseen that any of the "power" condi-

³⁵ Although due process restrictions could apply even when the forum applies a law other than its own, the temptations are far greater to stretch the reach of the forum's own law than to strain to apply the law of some other jurisdiction. Consequently the discussion in the text concentrates on choice of forum law.

³⁶ Instances of such a nonminimal relationship would include domicile or residence in the forum, when the issue relates to such things as personal status or intrafamilial matters or the economic interests of the state's domiciliaries or residents in general; ownership or operation of a business establishment in the forum, when the issue concerns the business; and conduct connected with the matter at issue and carried on elsewhere, either with a focus specifically on the forum (e.g., a scheme to defraud forum residents, or an automobile trip begun elsewhere with the forum as its destination), or conduct with a more general focus that clearly includes the forum in more than an incidental sense (e.g., a nationwide advertising campaign).

³⁷ Examples of conduct to which a forum rule attaches significance would include making a contract, when the forum rule establishes the consequences of a contractual relationship; acting in a way the forum considers negligent; executing a trust instrument which the forum treats as testamentary; or creating a corporation, when the forum rule regulates internal corporate affairs.

A "relevant jurisdiction" is one with any of the traditional contacts or one with an interest in the application of its law to the specific facts.

tions (as set out in paragraph (1) *supra*) would be met in the forum or, perhaps, in a state having substantially the same rule as the forum.

(c) Even if there is an actual or anticipated benefit derived from the forum (or an arguably foreseeable contact with it under (b) *supra*), if the severity of the forum rule is out of all proportion to the benefit derived from the forum by the affected party (or if the forum rule is severe and the foreseeability of the forum contact under (b) is debatable), it would be manifestly unfair to apply the forum's rule.³⁸

E. *Explanation*

The existence of a forum governmental interest in applying its own law to the specific facts is neither a necessary nor a sufficient condition for the satisfaction of due process requirements. Traditional doctrine purported to ignore such things. The Supreme Court's most recent pronouncement on choice of law sanctioned the ultimate choice of the (nonforum) law of the place of wrong—the site of an airline crash—even though that state had no apparent interest in the application of its law.³⁹ Conversely, in *Dick* the Supreme Court struck down application of forum law on due process grounds, even though the forum had an interest in applying its own rule.⁴⁰

³⁸ In order to avoid highly subjective and indeterminate balancing exercises under the banner of due process, this principle should be applied only when the disproportion is obvious.

³⁹ *Richards v. United States*, 369 U.S. 1 (1962). The Court's dictum said in part: Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.

Id. at 15. The outcome shows that the Court did not have governmental interest analysis specifically in mind, or at least had not thought carefully about it. This is suggested also by the Court's reference to a state's "interest in the multistate activity" rather than to its interest in effectuating the policies underlying its own law—the latter being the concern of interest analysis. For discussion of *Richards* under the fairness test proposed in the text, see note 179 *infra*.

See also R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 388 (1971) (acknowledging that application of forum law without a governmental interest does not violate due process under current doctrine).

⁴⁰ Texas had an interest in applying its rule to protect *Dick* at all relevant times, since he was first a nonresident Texas domiciliary and later a resident domiciliary.

Language in *Aldens, Inc. v. Packel*, 524 F.2d 38, 43 (3d Cir. 1975), *cert. denied sub. nom. Aldens, Inc. v. Kane*, 96 S. Ct. 1684 (1976), suggests that a substantial forum interest would satisfy due process objections. On its facts, *Aldens* would clearly meet both aspects of

Interest analysis developed relatively recently, at least insofar as it represents a judicially-articulated method for choice of law. Although it can be relevant to due process assessment (an interested forum is less likely to be reaching beyond reasonable limits than a noninterested forum),⁴¹ it invites too much judicial speculation to be a dependable due process test.⁴² In any event, its unique focus on governmental policies and interests raises issues more directly the concern of the full faith and credit clause.⁴³

To return to the specific standards proposed above, it will be apparent that the first—relating to contacts with, or relationship of the resisting party to, the forum—concerns the power rationale. The contacts or relationships envisaged by it would provide the essential due process nexus, even if in a particular case they would not result in applying forum law under a traditional choice-of-law rule.⁴⁴ The function of the nexus is not to supply a due process choice-of-law rule for all cases, but to insure that a state has sufficient contacts with a claim or defense to justify the application of its own rule of decision. Thus in *Watson* and *Clay*, even though the issue might have been characterized as the validity of a contractual provision and the place of contracting might have determined what law to apply, the occurrence of the insured-against harm in the forum would provide the required nexus for application of forum

the due process test proposed in this Article, without having to rely on the forum's interest in applying its own law.

⁴¹ See *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 72 (1954).

⁴² See text following note 9 *supra*.

⁴³ See text accompanying notes 111-32 *infra*. Compare Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394, 403 (1971), with the formulation proposed above. Sedler rejects physical contacts as a necessary condition for applying forum law, and says that

the forum may apply its own law on the ground that the plaintiff is a resident of that state where: (1) the fact of residency gives it an interest in applying its law on the issue as to which a conflict exists, and (2) the application of its law does not produce fundamental unfairness or defeat the legitimate expectations of the other party.

Id. at 403 (emphasis omitted). Presumably, Professor Sedler's proposed standard takes into account full faith and credit as well as due process considerations. If this assumption is correct, there seems to be no irreconcilable inconsistency between his approach and that taken in this Article. However, Professor Sedler's approach lacks the specificity necessary for a standard to have useful predictive power.

⁴⁴ Cf. Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 601-02 (1953); Leflar, *Constitutional Limits on Free Choice of Law*, 28 LAW & CONTEMP. PROB. 706, 726-27 (1963). As the second (fairness) half of my proposed formulation makes clear, nexus alone does not satisfy due process. The early cases stressing only traditional contacts for due process purposes, such as *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918), have been overruled sub silentio.

law. *Dick* had no such nexus, unless the presence of the reinsurers supplied it. However, the Court ignored their presence when discussing due process rights, and they had no direct involvement in the matters at issue.⁴⁵

The truly difficult task is defining the fairness standard. One must explain the leading cases and supply a normative test that is both useful in deciding most or all future cases and consistent with widely shared American values. On the latter point, most would agree that receipt of a benefit would justify the imposition of a roughly commensurate legal burden. This fairness standard reflects the pervasive notion in our society that exchange is beneficial. To the extent that a choice-of-law fairness standard can approximate that—exchanging benefits derived from sources within a state for the possible burden of an adverse legal rule directly related to those benefits—it reflects and even reinforces that positive norm in the society.⁴⁶ Moreover, a court can apply such a test to cases in which the parties seek some material benefit, since the sources of any actual or anticipated benefits can usually be ascertained.

Of course, not all cases involve transactions in which a material benefit has been sought. Take, for example, the case of the dog straying from its owner's yard in a "one bite" state to bite the plaintiff just across the border in an "absolute liability" state. Since the owner sought no "benefit," some other fairness test must be used. Although no workable test appears to have quite the virtues of the benefit test (in the sense that we can agree on the direct correlation between benefit and burden), most would agree that the proposed test—foreseeability of the contact—will at least prevent the most serious unfairness. If a person cannot reasonably foresee that his conduct or his relationships will touch a particular

⁴⁵ *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930). See also the explanation of *Dick* in *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 71 (1954).

⁴⁶ The due process test in cases involving state taxation of interstate commerce is often formulated in terms of granting taxing authority to the state if the taxpayer derives benefits from it. See *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756-58 (1967); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). The Supreme Court, however, has not always clearly distinguished the benefit test from the minimum contacts (power) test. See, e.g., *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 758 (1967). But see *id.* at 765-66 (Fortas, J., dissenting opinion).

The fairness aspect of due process for purposes of personal jurisdiction has also been phrased in terms of exchanging jurisdictional burdens for benefits obtained from the state. See, e.g., *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137, 1143-44 (7th Cir. 1975); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

state, one cannot expect him to tailor the conduct or relationships to take account of that state's law. Even if in practice he would not be inclined to engage in that sort of tailoring, he ought at least to have the option. Conversely, if he has had the option (because the contact or relationship was foreseeable), holding him to the adverse rule usually will not seem unfair.

It might seem that the "foreseeable contact with the forum" test would be a useful surrogate for the benefit test, since there would normally be an actual or anticipated benefit from the forum when the foreseeable contact test is met. However, it does not appear to operate fairly in all cases involving economic benefits. For example, if the parties to a business transaction define their performance to exclude any possible benefit from certain states, even if parties might have foreseen contact with an excluded state, applying the excluded state's outcome-determinative rule to the transaction would work an injustice if the parties neither foresaw nor realized a benefit from the contact.⁴⁷

The "manifest unfairness" standard does not expressly appear in the *Dick* opinion in anything like the form outlined above. Nevertheless, the benefit test complements the contact test to explain the result. The Court clearly referred to concepts of fairness in stressing that Texas had not merely applied a forum statute of limitations to matters arising elsewhere, but had attempted to change the parties' obligations under a contract.⁴⁸ Essentially, it was unfair to increase that obligation by applying Texas law when there were neither contacts with Texas, nor benefits derived from Texas sources. A Mexican company issued the insurance policy to a Mexican resident. It was carefully drawn to cover only Mexican losses, was expressly made subject to Mexican law, and provided that the insurer pay for any loss in Mexico City. Thus, these factors conclusively indicate that the insurer could obtain no benefit in the form of increased premium or competitive advantage from any Texas coverage. If coverage had extended beyond Mexican waters and if there had been some possibility that the insured might have

⁴⁷ Professor Martin has given an example of such a case. See Martin, *supra* note 1, at 210-11. It is discussed in Part III *infra*.

⁴⁸ *Home Ins. Co. v. Dick*, 281 U.S. 397, 409 (1930). The Court probably went further than it would today in suggesting that there was a critical due process distinction between the case before it and one involving two statutes of limitations without a contractual limitation period. The point is that the Court did have a fairness concept in mind. The problem is to translate it into terms relevant to a system in which the substance-procedure distinction and the inviolability of contract have diminished roles.

taken the vessel to Texas waters, the insurer could have charged a higher premium, thereby obtaining a Texas-related benefit.⁴⁹

Professor Weintraub has pointed out that the policy made the loss payable to "the Texas Gulf Steamship Company of Galveston, Texas, and C. J. Dick, as their respective interests may appear."⁵⁰ Dick claimed that this located contract performance in Texas, which, if true, would have given the insurer a benefit derived from Texas. The Court, however, noted that the policy stated the insurer would pay claims in Mexico and added: "Nothing [under the reinsurance contracts] was to be done, or was in fact done, in Texas."⁵¹ Consequently, the insurer derived no actual or foreseeable benefit from Texas sources, based on the loss-payable clause.

The more usual characterization of the *Dick* result stresses the unfair surprise to the insurer when the Texas courts applied Texas law. Professor Weintraub originally viewed *Dick* as an "unfair surprise" case, but altered his position upon discovering the express designation in the policy of a Texas beneficiary and upon finding that the insurer had a right to, and did, consent to the assignment of the policy to Dick.⁵² But characterizing *Dick* as a no-contact, no-benefit case renders it irrelevant to ask whether application of Texas law unduly surprised the insurer.⁵³ The key is the insurer's attempt to localize the transaction in Mexico, without receiving any actual or potential benefit from Texas; it would be manifestly unfair to apply Texas law to undo a perfectly valid (in Mexico) contractual provision, even if the insurer somehow could have foreseen that Texas law might ultimately be applied to some aspects of the transaction.⁵⁴

⁴⁹ See *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 182 (1964), quoting *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 221 (1960) (Black, J., dissenting opinion); *Watson v. Employers Liab. Corp.*, 348 U.S. 66, 71 (1954).

⁵⁰ R. WEINTRAUB, *supra* note 39, at 385. See also *Home Ins. Co. v. Dick*, 281 U.S. 397, 403 n.2 (1930).

⁵¹ *Home Ins. Co. v. Dick*, 281 U.S. 397, 404 (1930).

⁵² Compare Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 455 (1959), with R. WEINTRAUB, *supra* note 39, at 385.

⁵³ Irrelevant or not, I disagree with Professor Weintraub about the likelihood of real surprise to the insurer when Texas law was applied. Everything about the policy except the designation of the beneficiaries was focused on Mexico. Texas did not have personal jurisdiction over the Mexican insurer. Home Insurance obtained reinsurance with two New York companies, not with Texas companies. It is most unlikely that the Mexican insurer could reasonably have foreseen that its obligations might be brought before a Texas forum simply because the insured could garnish the reinsurer's assets in Texas at the time of the ultimate suit. Clearly, no other forum—certainly not a Mexican one—would have applied the Texas statute extending the contractual limitation period.

⁵⁴ The suggested rationale also avoids the question of whether there was such detri-

Formulating the fairness aspect of the due process test in terms of benefits actually or foreseeably derived from the forum comports with the facts and result in *Dick*, and avoids the circuitous process of trying to decide what law a party could reasonably expect to control any aspect of a transaction or event. Questions of foreseeability remain, but they focus on events and relationships, not the foreseeability of a state's law being applied. Thus, one avoids inquiries into the extent of the parties' legal sophistication or the identification of factors that lead laypersons to believe they might be subject to one legal system or another.⁵⁵

It remains to be shown that the suggested characterization of *Dick* can survive the Supreme Court's liberality toward forum law in *Watson* and *Clay*. Those cases also involved provisions in insurance policies valid in the state where the contract was made, but abrogated by forum law. Unlike the policy in *Dick*, which covered only losses in certain Mexican waters, the policies in those cases expressly covered losses anywhere in the United States. The *Watson*

mental reliance on the contractual limitation period that the application of the Texas statute would be unfair. Professor Martin has concluded that any such reliance "was probably not detrimental." Martin, *supra* note 1, at 189. However, insertion of a locally valid, short limitation period in its contracts probably enabled the insurer to charge somewhat smaller premiums than if its exposure to suit lasted substantially longer. This would occur not only because the insurer would avoid liability and the cost of defending some claims upon expiration of the shorter period, but because shortening the time the insurer must hold liquid reserves to cover doubtful or disputed claims would minimize administrative costs and foregone investment opportunities. Cf. *Hearings on Federal Malpractice Insurance Act, 1975, Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 472, 494 (1975) (prepared statements of American Mut. Ins. Alliance and American Ins. Ass'n); *Report of the Professional Liability Committee*, 43 INS. COUNSEL J. 207, 209-10 (1976) (medical malpractice insurance an imperfect analogy because of greater uncertainty as to amount and validity of a claim after the occurrence than in the case of casualty insurance).

⁵⁵ Because of the difficulty of extracting a workable "expectation of choice of law" test from *Dick*, some leading commentators have resorted to vague and one-dimensional characterizations of the case. See, e.g., R. WEINTRAUB, *supra* note 39, at 386:

[T]he application of Texas law violated due process because the contacts that Texas had with the parties and with the transaction were not sufficient to make it reasonable for Texas to enforce the policies underlying the Texas law.

Leflar stated:

The outer limit on constitutionality that [*Dick*] suggests is that no state may create (or destroy) substantive claims by determining them under the law of a state which has no substantial connection with the transaction . . .

Leflar, *supra* note 44, at 717. See also R. LEFLAR, *AMERICAN CONFLICTS LAW* 134-35 (1968); cf. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 9 (1971). Professor Leflar discounts the idea that a formula with greater specificity than "substantial connection" or "fair play and substantial justice" would have sufficient flexibility to cover all cases. Leflar, *The Converging Limits of State Jurisdictional Powers*, 9 J. PUBLIC L. 282, 292 (1960).

decision pointed out this distinction,⁵⁶ and although the brief opinion in *Clay* did not mention the coverage restriction in *Dick*, it did stress the worldwide scope of coverage in the insurance policy under consideration.⁵⁷ By expressly insuring against losses in the United States without geographic limitation, the insurers obtained a benefit from each state in which the insured might suffer a loss. Since the increased geographic scope of coverage raised the value of the policy to the insured, the insurer could charge a higher premium or secure a more competitive position against other insurers.⁵⁸ Consequently, it was fair to subject the insurers to the law of any state to which coverage extended, as long as those laws were not so severe as to impose burdens greatly disproportionate to the benefits. Moreover, because the insured-against risk actually occurred in the forum in each of those cases, the due process power rationale was satisfied.⁵⁹

II

FULL FAITH AND CREDIT

A. *The Limits of Provincialism*

The full faith and credit clause primarily serves to prevent *excessive* provincialism in legal matters among states in a federal system.⁶⁰ Some provincialism is inevitable. It would be futile, or at least not worth the resources expended, to try to eradicate it all. Consequently, the clause serves its purpose if it prevents a state from using its legal system to interfere with the nation's multistate

⁵⁶ *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 71-72 (1954).

⁵⁷ *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 182 (1964).

⁵⁸ Professor Martin notes that in *Clay* the insured paid a lump-sum premium before moving to Florida, and appears to conclude that consequently the insurer derived no direct benefits from Florida. Martin, *supra* note 1, at 212 n.87. Although receipt of premiums from Florida would have met the benefits test, other benefits would also suffice. The insurer's exchange of Florida-inclusive coverage for an economic return clearly constitutes a benefit attributable to that state. See text accompanying note 49 *supra*.

⁵⁹ This analysis confirms the Supreme Court's hints that *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934), is no longer good law. See *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 181-82 (1964); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 71 (1954). The insurance contract in *Delta & Pine* covered losses "anywhere," and the loss occurred in the forum. Under present due process standards, the forum could apply its law abrogating the insurance contract's limitation period.

⁶⁰ See Martin, *supra* note 1, at 193-94 (emphasis added). For historical discussion of the clause, see Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33 (1957); Sumner, *The Full-Faith-and-Credit Clause—Its History and Purpose*, 34 ORE. L. REV. 224 (1955).

legal system, or from brushing aside the legitimate interests of another state without solid justification.

Unless a forum state directly challenges the requirements of federalism (for example, by refusing to adjudicate disputes arising in any other state), one must clearly identify the other state or states having an interest and determine the extent of the insult they would suffer from having their law ignored.⁶¹ The problem is more difficult than with full faith and credit to judgments, where the focus on, and sensitivity of, the rendering state is clear. Something must take the place of the judgment to provide the necessary focus on the law of a particular state, unless the case involves a significant question of nationwide harmony. Moreover, unless a failure to defer to a given state's law would represent a clear slap in the face to that state or to the federal system itself, the full faith and credit clause and the Supreme Court simply cannot assume the day-to-day task of sorting out the provincialism still at large.⁶²

Professor Martin, however, argues that the full faith and credit balancing test⁶³ should apply, when the connection between the defendant and the forum is relatively weak. He would have courts "weigh . . . [the] competing state interests, both in terms of quantity and importance."⁶⁴ He concedes that this is an uncertain process, but asserts that it accounts for the results of the cases.⁶⁵ The

⁶¹ Although the full faith and credit clause, U.S. CONST. art. IV, § 1, refers only to "public Acts, Records, and Judicial Proceedings," without making clear whether this includes common law, authorities now agree that it does. See, e.g., Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 15-16 (1958), reprinted in B. CURRIE, *supra* note 9, at 196; Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 12 (1945). See also *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436 (1943) (reference to full faith and credit "to which local common and statutory law is entitled").

⁶² Some would use the full faith and credit clause as an enabling measure for federalizing choice of law in diversity cases or even in all cases. Compare Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 33-42 (1963), with Cardozo, *Choosing and Declaring State Law: Deference to State Courts Versus Federal Responsibility*, 55 NW. U.L. REV. 419, 431-36 (1960); cf. Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 U.C.L.A. L. REV. 1191 (1967). Before that happens one would hope to find a relatively high degree of consensus supporting a single choice-of-law approach. If anything, the level of consensus has receded since Professor Cheatham's 1953 lament that a federal choice-of-law system was premature because of the relative infancy of conflicts doctrine. See Cheatham, *supra* note 44, at 588. Professors Baxter and Cardozo disagree as to the choice-of-law methodology they would extract from the full faith and credit clause.

⁶³ See text accompanying note 2 *supra*.

⁶⁴ Martin, *supra* note 1, at 216.

⁶⁵ *Id.* He seems to consider the strength of the connection (in terms of a party's physical presence in the forum or derivation of benefits from it) as an independent standard satisfying any full faith and credit objections. But full faith and credit concerns the in-

danger in such an assertion is that one might simply assign weights, without any determinable standard, to justify the results of cases decided on other premises, or that weighing will become a constitutional tool for selecting results one might desire on "better substantive law" grounds. Except in a very limited sense, the cases do not support a balancing standard.

B. *The Leading Full Faith and Credit Cases*

Bradford Electric Light Co. v. Clapper:⁶⁶ A power company line-man who was employed and normally worked in Vermont was sent to fix burned-out fuses just across the state line in New Hampshire. While doing so, he came in contact with a high-power line and was killed on the spot. He left no dependents.⁶⁷ Although Vermont had a workmen's compensation act that purported to provide an exclusive remedy, his administratrix sued the employer in New Hampshire under a New Hampshire statute permitting wrongful death recovery for an employer's negligence. The United States Supreme Court held that permitting such a suit would deny full faith and credit to the Vermont act. The administratrix argued that recognition of the Vermont act would be contrary to New Hampshire public policy, and thus should not be required. The Court responded by pointing out that the Vermont act did not offend New Hampshire's policy. The Court did not think (as a casual reading of some of the later cases might suggest)⁶⁸ that New Hampshire would consider Vermont's law compatible with its own, but found that New Hampshire had no interest—or, as the Court said, only a "casual" interest⁶⁹—in applying its policy to the specific facts of the case.

Alaska Packers Association v. Industrial Accident Commission:⁷⁰ A workmen's compensation award by the state of employment was

terests of states, not simply the nexus between the forum and the parties or the transaction. In some cases such connections might suggest an absence of other states' interests and obviate the need for full faith and credit protection, but not in all cases. Cf. *Broderick v. Rosner*, 294 U.S. 629 (1935), discussed in text accompanying notes 80 & 125 *infra*. Professor Martin's "connection with the forum" test is essentially a due process notion.

⁶⁶ 286 U.S. 145 (1932).

⁶⁷ For a full statement of the facts, see *Bradford Elec. Light Co. v. Clapper*, 51 F.2d 992, 993-94 (1st Cir. 1931).

⁶⁸ See *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493, 504 (1939); *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532, 549 (1935).

⁶⁹ *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 162 (1932).

⁷⁰ 294 U.S. 532 (1935).

upheld, although the recipient was a nonresident, and had been injured outside the state of employment. The United States Supreme Court stressed the interest of the state of employment in applying its compensation scheme and the *prima facie* right of every state to enforce its own statutes. Some interest-balancing language was used.

Pacific Employers Insurance Co. v. Industrial Accident Commission.⁷¹ The Supreme Court upheld a workmen's compensation award by the state of the accident although the injured nonresident had entered into the employment relationship in the state of his residence (where the workmen's compensation scheme purported to be the exclusive remedy). California, the state of the accident, had declared its policy to protect not only the employee but particularly any local medical creditors.⁷² Medical creditors had filed liens against the plaintiff under the California act.⁷³ The Court distinguished *Clapper* on the ground that, "there was nothing in the New Hampshire statute, the decisions of its courts, or in the *circumstances of the case*, to suggest that reliance on the provisions of the Vermont statute . . . was obnoxious to the policy of New Hampshire."⁷⁴ The Court in *Pacific Employers* declined to enter into an interest-balancing process.

Carroll v. Lanza.⁷⁵ As in *Pacific Employers*, a person domiciled and employed in one state (Missouri) was injured in another (Arkansas) in the course of employment. As in *Clapper*, the plaintiff brought a tort action for damages in the state of injury, although this time the defendant was not the immediate employer. The injured employee had returned to his home state right after the injury, apparently leaving no medical creditors in the state of injury. It was held that awarding common-law damages would not deny full faith and credit to the workmen's compensation law of the state of employment. *Pacific Employers*, in the Supreme Court's view, had "departed . . . from the *Clapper* decision."⁷⁶ Without balancing state interests, the Court said that in the type of case before it, "[t]he State where the tort occurs certainly has a concern in the problems following in the wake of the injury. The problems

⁷¹ 306 U.S. 493 (1939).

⁷² *Id.* at 504.

⁷³ *Id.* at 498.

⁷⁴ *Id.* at 504 (emphasis added).

⁷⁵ 349 U.S. 408 (1955).

⁷⁶ *Id.* at 412.

of medical care and of possible dependents are among these, as [*Pacific Employers*] emphasizes."⁷⁷

Hughes v. Fetter:⁷⁸ The Wisconsin wrongful death act, as construed by the Wisconsin Supreme Court, precluded wrongful death actions in Wisconsin when the death was caused outside the state. The plaintiff brought suit in Wisconsin for a death caused in Illinois. The Supreme Court held that Wisconsin denied the Illinois act full faith and credit by refusing to entertain the action. No Wisconsin policy prevented wrongful death suits in general, there was no forum non conveniens argument (since all parties were from Wisconsin), and Wisconsin did not assert any interest in applying its own law on the merits. It had simply discriminated against wrongful death claims "arising" elsewhere.⁷⁹

Broderick v. Rosner:⁸⁰ A New Jersey statute provided that no suit to enforce a stockholder liability statute of another state could be brought in its courts, unless certain virtually insuperable procedural obstacles were overcome. The New York Superintendent of Banks sued the New Jersey stockholders of a New York bank having all its places of business in New York City, to enforce assessments made under a New York statute rendering stockholders of an insolvent bank liable for its debts to the extent of the par value of their stock. The Supreme Court obviously regarded the insulation of New Jersey stockholders from such liability as the real purpose of the New Jersey statute. The Court stressed that the subject matter was peculiarly within the regulatory power of New York,⁸¹ and that it was focusing on the New York statute (rather than on the assessments) as the public act to which full faith and credit was owed.⁸² It said:

Obviously, recognition could not be accorded to a local policy of New Jersey, if there really were one, of enabling all residents of the State to escape from the performance of a voluntarily as-

⁷⁷ *Id.* at 413.

⁷⁸ 341 U.S. 609 (1951).

⁷⁹ The Court supplied this *Hughes* construction in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953) (upholding application of forum's statute of limitations to bar claim arising in another state). See also *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). *Hughes* was followed in *First Nat'l Bank v. United Air Lines, Inc.*, 342 U.S. 396 (1952).

⁸⁰ 294 U.S. 629 (1935).

⁸¹ *Id.* at 643. Although the Court supported this assertion simply by pointing out that New York was the state of incorporation, in fact the bank centered its business there. Thus the case for enforcement of the New York statute was stronger than the Court suggested.

⁸² *Id.* The assessments might have been assimilated to judgments for full faith and credit purposes, but were not.

sumed statutory obligation, consistent with morality, to contribute to the payment of the depositors of a bank of another State of which they were stockholders.⁸³

This suggests that a forthright New Jersey policy against stockholder liability, all other facts being the same, would also have been unavailing.

John Hancock Mutual Life Insurance Co. v. Yates:⁸⁴ The insurer issued a life insurance policy in New York to a New Yorker who had misrepresented his state of health on the policy application. A month later, the insured died from a pre-existing disease. His widow moved to Georgia and brought suit on the policy. New York law made a material misrepresentation in the application a complete defense on the policy even if the insurance agent knew about the misrepresentation. Georgia law imputed an agent's knowledge of the facts to the company, and left the materiality of any misrepresentation to the jury. The Georgia courts held that these matters went to the remedy only; consequently, the law of the forum controlled. The Georgia Supreme Court affirmed a jury verdict for the face amount of the policy. The United States Supreme Court struck down Georgia's blatantly self-serving "procedural" characterization, holding that Georgia had to extend full faith and credit to the New York statute.⁸⁵

Watson v. Employers Liability Assurance Corp.:⁸⁶ The Supreme Court briefly considered full faith and credit after disposing of the due process argument against the application of Louisiana's direct-action statute. The Court held that full faith and credit did not require Louisiana to subordinate its law to that of Massachusetts, where the insurance contract was executed, and where the company whose division manufactured the defective product had its headquarters. The Supreme Court asserted: "[P]lainly these [Massachusetts] interests cannot outweigh the interest of Louisiana in taking care of those injured in Louisiana."⁸⁷ The Louisiana

⁸³ *Id.* at 644.

⁸⁴ 299 U.S. 178 (1936).

⁸⁵ The opinion contains some language reflecting now-obsolete vested rights choice-of-law doctrine. It is apparent, however, that the Court was primarily motivated by the principle that one state should not be allowed to twist a standard choice-of-law technique (in the *Yates* case, characterization) to avoid having to select the law of the state that clearly would have been selected by proper use of the technique. The principle would apply equally today to techniques other than those supplied by the first RESTATEMENT OF CONFLICT OF LAWS (1934).

⁸⁶ 348 U.S. 66 (1954). See text accompanying note 14 *supra*.

⁸⁷ 348 U.S. at 73.

statute did not discriminate against non-Louisiana insurance policies, nor was it a subterfuge for some other policy directed against sister-state interests.

Order of United Commercial Travelers v. Wolfe:⁸⁸ The constitution of a fraternal benefit society incorporated and having its principal office in Ohio provided death benefits as a major perquisite of membership, but prohibited any action on a claim more than six months after its disallowance by the society's governing body. The provision was valid under Ohio law, which authorized such societies and closely regulated them. A South Dakota member died, leaving his mother (also a South Dakota domiciliary) as his beneficiary. When her claim was disallowed, she challenged the disallowance in court within the six-month period. She lost on appeal, but the proceedings were ultimately dismissed without prejudice. She then assigned her claim to Wolfe, an Ohio domiciliary, who was to act in a fiduciary capacity to enforce the claim for her. The assignment took place more than six months after disallowance of the decision by the society. When Wolfe brought suit in South Dakota, the court applied a South Dakota statute invalidating the society's six-month limitation period. The United States Supreme Court, in a five-to-four decision, held that South Dakota, by refusing to enforce a provision valid under Ohio law, had violated the full faith and credit clause.

The Court stressed that more than a normal insurance contract was involved. Rather, it was dealing with a voluntary fraternal organization having members in many states with organizational benefits and obligations determined by one unifying law.⁸⁹ In the view of the majority, bits and pieces of the unifying law could not be removed by a state other than the enabling state without seriously upsetting the unified whole. Near the end of a long opinion, the majority gave an indication that it had been weighing policies:

⁸⁸ 331 U.S. 586 (1947).

⁸⁹ The Court noted that the society's constitution filled 90 closely-printed pamphlet pages, setting up a complicated structure of councils and officers, and designating membership conditions, rules for meetings, benefits and assessments, and procedures for amending the constitution. *Id.* at 602-05. The majority relied on a series of fraternal benefit society cases in which the same point had been stressed: It was essential that all states defer to the single unifying law of such a multipurpose, representative organization. *See, e.g., Modern Woodmen of America v. Mixer*, 267 U.S. 544 (1925) (absent member's presumed death must be determined by law of state of incorporation); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915) (by-law amendment valid everywhere when upheld by court in state of incorporation).

The weight of public policy behind the general statute of South Dakota, which seeks to avoid certain provisions in ordinary contracts, does not equal that which makes necessary the recognition of the same terms of membership for members of fraternal benefit societies wherever their beneficiaries may be.⁹⁰

Finally, the Court added a sentence that has engendered some misunderstanding:

It is of the essence of the full faith and credit clause that, if a state gives *some* faith and credit to the public acts of another state by permitting its own citizens to become members of, and benefit from, fraternal benefit societies organized by such other state, then it must give *full* faith and credit to those public acts and must recognize the burdens and limitations which are inherent in such memberships.⁹¹

C. *Interest Balancing*

Interest balancing language appears in a few of these cases,⁹² and in some it is possible to conclude that the interests of one state clearly outweigh those of another. But to draw from them an interest-weighting test in any but the most restricted sense is to attribute too much weight to a standard that does not have significant force as a predictor of future outcomes, nor potential value as a reasonably objective decision-making tool.⁹³ Thus, for example, the interest-balancing approach taken in *Alaska Packers* was quickly abandoned in *Pacific Employers* and remained at rest in *Carroll*.⁹⁴

*Hughes v. Fetter*⁹⁵ was a full faith and credit balancing case only in the most lopsided sense. Professor Martin clouds the issue by viewing the result in "policy-balancing" terms. He argues that Wisconsin had no policy on out-of-state wrongful death suits, since it refused to hear such suits in its courts, and thus had nothing to

⁹⁰ *Order of Commercial Travelers v. Wolfe*, 331 U.S. 586, 624 (1947).

⁹¹ *Id.* at 625 (emphasis in original). It is tempting to assume that the outcome in *Wolfe* was significantly influenced by the fact that the beneficiary had clearly had her day in court.

⁹² See, e.g., *Carroll v. Lanza*, 349 U.S. 408, 418-19 (1955) (Frankfurter, J., dissenting opinion) (interest-balancing language); *Aldens, Inc. v. Packel*, 524 F.2d 38, 44-45 (3d Cir. 1975), *cert. denied sub nom. Aldens, Inc. v. Kane*, 96 S. Ct. 1684 (1976).

⁹³ Cf. R. WEINTRAUB, *supra* note 39, at 203; Jackson, *supra* note 61, at 28.

⁹⁴ There is dictum in *Richards v. United States*, 369 U.S. 1, 15 (1962), suggesting that despite the Supreme Court's rather hazy concept of state interests, it would not espouse any broadly applicable balancing test. See also *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 558 n.12 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

⁹⁵ 341 U.S. 609 (1951).

weigh against the Illinois policy supporting wrongful death recovery for deaths in Illinois.⁹⁶ But it is not apparent why Wisconsin's attempt to avoid entertaining suits of that sort indicates disavowal of a policy on the matter. There may have been a policy to relieve court congestion by eliminating cases in which Wisconsin was unlikely to have a substantive interest,⁹⁷ or to eliminate suits under unfamiliar wrongful death acts when foreign plaintiffs would normally be pitted against Wisconsin defendants.⁹⁸ Neither of these possible policies could withstand full faith and credit challenge under the facts of *Hughes*, but it is not because they were disavowed. It is because Wisconsin had no interest in applying them to the *Hughes* case, and by doing so anyway it discriminated without cause against Illinois.

If the policy was to eliminate cases in which Wisconsin was unlikely to have an interest, that policy was obviously inapplicable since the parties were all Wisconsinites. If the policy was to eliminate suits under unfamiliar wrongful death acts that might favor nonresident plaintiffs, it too would be inapplicable and would in any event simply underline Wisconsin's discrimination against foreign causes of action as well as against foreign plaintiffs. Consequently, Wisconsin had no interest in applying either policy; its only reason for applying the statute was to close its doors to a cause of action solely because it arose in another state.⁹⁹ In a sense, a balance of interests, not policies, was involved. But it is tenuous at best to draw a broadly applicable balancing test from a case in which the forum had no interest to put in the scale.

⁹⁶ Martin, *supra* note 1, at 218-20. Throughout most of Professor Martin's Article, he focuses on "interest-balancing" rather than "policy-balancing." The difference would be comparable to the difference between Professor Baxter's comparative impairment and Professor Leflar's "better law" approaches to choice of law. Compare Baxter, *supra* note 62, with Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1587-88 (1966).

⁹⁷ See 35 MARQ. L. REV. 303, 305 (1952). Supporting citation is not given in this student piece.

⁹⁸ See Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 55-59 (1959), reprinted in B. CURRIE, *supra* note 9, at 301-04. The Wisconsin Supreme Court said it was following a statutory policy, but it conveniently neglected to say what that policy was. *Hughes v. Fetter*, 257 Wis. 35, 38, 42 N.W.2d 452, 453 (1950), *rev'd*, 341 U.S. 609 (1951).

⁹⁹ If the Wisconsin policy really sought to eliminate court congestion, then the statute, as interpreted by the Wisconsin Supreme Court, was too broad. Had it been drafted narrowly, to preclude only suits in which the doctrine of *forum non conveniens* would legitimately apply, it would not have barred the action in *Hughes* and probably would have avoided any full faith and credit problems. Cf. *Hughes v. Fetter*, 341 U.S. 609, 612-13 (1951).

Professor Martin also finds a balancing explanation for the result in *Watson*: "The interests of Louisiana in the compensation of its domiciliary outweigh the 'procedural' interest of Massachusetts or Illinois to uphold the contract clause barring direct actions."¹⁰⁰ This is not much more helpful than the balancing explanation of *Hughes*. *Watson*, however, was a true conflict in interest-analysis terms.¹⁰¹ Weighing the interests in a true conflict—at least as a matter of constitutional compulsion—is a slippery process that the Supreme Court wisely avoided. When it said that Massachusetts's interest "cannot outweigh the interest of Louisiana,"¹⁰² it was simply eschewing any attempt to assign weights to each interest. It was enough that Louisiana had a significant interest in taking care of those injured there. For this the Court relied on *Pacific Employers*, another case in which it had declined to enter into a balancing process.

I am talking here only about a constitutional outer limit on the latitude of a state to apply its own law. If a state wishes to adopt some form of interest-balancing as its normal choice-of-law method, or perhaps as a tie-breaker for true conflicts in the interest-analysis sense, it should be free to do so within broad boundaries. It remains, then, to be determined just what those full faith and credit boundaries are.

D. *Full Faith and Credit Formulation*

Taking into account what the Supreme Court has actually said and done, it is possible to formulate full faith and credit standards that are sufficiently well defined to have predictive power for future cases. Because some latitude for provincialism must necessarily be granted, the following standards are stated primarily as limiting factors, allowing whatever they do not expressly preclude:

(A) The forum state cannot devise a policy or rule for a particular case or discrete class of cases that defeats a claim for relief or a defense created by the law (at least if it is statutory law, but

¹⁰⁰ Martin, *supra* note 1, at 211.

¹⁰¹ The insurance company was British but was doing business in Massachusetts, under whose law it would be protected from the direct action. Gillette, which procured the insurance for its Toni division, was headquartered in Massachusetts. The Massachusetts policy apparently was designed to protect insurance companies from inflated jury verdicts in order to hold premiums down. Massachusetts would be interested in applying its law to effectuate that policy protecting not only the insurance company doing business there, but Massachusetts-headquartered companies, such as Gillette, whose premiums would reflect inflated verdicts against their insurers.

¹⁰² See text accompanying note 87 *supra*.

probably also common law) of another state whose law the forum would apply under its normal choice-of-law approach. Thus:

(1) It cannot refuse to provide a forum for adjudication of a transitory dispute arising out of an occurrence or relationship in another state, solely because it arose in another state or solely as a subterfuge for some disguised policy applicable to the merits of the dispute. It may, however, refuse to provide a forum if its refusal would effectuate a genuine policy for the orderly administration of justice or a genuine moral standard it considers fundamental—provided that its policy or standard is not so aberrational as to be thoroughly out of line with prevailing norms among virtually all other states.

(2) The forum state cannot defeat an otherwise enforceable claim or applicable defense based on another state's law by blatantly manipulating its professed choice-of-law method to apply its own law.

(B) The forum cannot choose its own law on a particular issue when, on the specific facts:

(1) Another state has an interest in applying its law that is overwhelming by comparison with the interest of the forum; or

(2) there is an overwhelming reason to decide all similar claims according to one legal system, and one state other than the forum clearly would be the bellwether.

(C) The forum cannot apply a statute of another state in a way that seriously distorts a nondivisible statutory scheme formulated by that state's legislature, unless the forum can justify its action by simply applying its own law to reach the same result.

E. *Explanation*

Category (A) reflects the *Hughes-Broderick-Yates* series of cases. As noted above, *Hughes* states the principle that a state cannot close its courthouse doors to transitory claims solely because they arise elsewhere; it may also represent the principle against subterfuge in (A)(1).¹⁰³ *Broderick* clearly represents the principle against subter-

¹⁰³ It is an open question whether refusal to provide a forum for sister-state penal or tax claims would run afoul of (A)(1). Probably the refusal to hear a sister-state tax claim should be held impermissible under that principle, if the tax liability runs against the person or moveable property. Rarely, if ever, would the orderly administration of justice in the forum be seriously disturbed by hearing such claims. *But see* Leflar, *Out-of-State Collection of State and Local Taxes*, 29 VAND. L. REV. 443, 447-48 (1976) (questioning whether Supreme Court would require enforcement of sister-state tax claims). Truly penal matters—enforcement of the criminal law—might fall within the “orderly administration of justice” exception because of the strong belief that the mores of the place of conduct weigh

fuge. As the Court implied, and as Professor Brainerd Currie clearly showed, the New Jersey legislature really wanted to change the entrenched state-of-incorporation choice-of-law rule to protect New Jersey residents who were stockholders of foreign corporations. It apparently feared full faith and credit repercussions if it acted directly, so it devised a forum-restricting scheme that made it virtually impossible to use the New Jersey courts to enforce any stockholder liability created by the law of another state.¹⁰⁴

The Supreme Court has indicated that a state may refuse to provide a forum out of a genuine concern for the orderly administration of justice or when it has a genuine public policy against recognition of the claim asserted, subject to Supreme Court review for basic consistency with the principles of federalism.¹⁰⁵ Thus, if it is truly an inconvenient forum, a state court may apply the doctrine of *forum non conveniens*. The public policy exception is more difficult, because it is more subjective. The Court has given unmistakable signals that a state may not simply announce that it has a public policy against entertaining the claim at hand and thus avoid further full faith and credit scrutiny.¹⁰⁶ Consequently, the authority of a state to deny a forum on public policy grounds probably would (and clearly should) be limited to situations in which fundamental, nonaberrational moral precepts incorporated in that state's law would be significantly impaired if it were to entertain the action.¹⁰⁷ If it has a policy that does not rise to the level of a fundamental moral precept, it could still apply its own

heavily in the outcome, and because of the relative ease of transfer (through extradition) to the state best equipped to decide the case. On the distinctions between penal and tax claims, see *State ex rel. Oklahoma Tax Comm'n v. Rodgers*, 238 Mo. App. 1115, 193 S.W.2d 919 (1946); Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193 (1932). See also Leathers, *Dimensions of the Constitutional Obligation To Provide A Forum*, 62 KY. L.J. 1, 22-32 (1973).

¹⁰⁴ See Currie, *supra* note 98, at 287-88, reprinted in B. CURRIE, *supra* note 9, at 345-46. Cf. *Ohio ex rel. Squire v. Porter*, 21 Cal. 2d 45, 56-57, 129 P.2d 691, 698 (1942) (Traynor, J., dissenting opinion), *cert. denied*, 318 U.S. 757 (1943).

¹⁰⁵ See *Hughes v. Fetter*, 341 U.S. 609, 612-13 (1951); *Griffin v. McCoach*, 313 U.S. 498, 507 (1941); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160 (1932). Cf. Currie, *supra* note 98, at 299-303, reprinted in B. CURRIE, *supra* note 9, at 357-60.

¹⁰⁶ See *Broderick v. Rosner*, 294 U.S. 629, 643-45 (1935); *Converse v. Hamilton*, 224 U.S. 243, 260 (1912).

¹⁰⁷ If the public policy forum-closing device is narrowly defined, as suggested, there seems neither reason nor authority to do away with it altogether, as urged by Leathers, *supra* note 103, at 8-21, and Seidelson, *Full Faith and Credit: A Modest Proposal . . . or Two*, 31 GEO. WASH. L. REV. 462, 463-76 (1962). For example, there is no reason why a state with a strong moral policy against gambling should be required to open its courts to claims based on Las Vegas gambling debts.

law on the merits—provided that it transgresses no other constitutional restrictions, including the full faith and credit limitations regarding choice of law on the merits.¹⁰⁸

Yates involved a blatant choice-of-law manipulation of the sort proscribed by category (A)(2).¹⁰⁹ The same principle would apply if a court professing to use interest analysis blatantly misconstrued the policy underlying another state's law, in order to justify application of forum law. These serious distortions of the choice-of-law process are rare, but when they do occur they involve such an unprincipled departure from normalcy in interstate choice of law that full faith and credit must step in to restore order—even if application of forum law might be justifiable under some choice-of-law method other than that professed by the forum.¹¹⁰

Category (B)(1) concerns the overwhelmingly interested state under the modern interest analysis approach. A state is interested when the policy (or at least one of the policies) reflected in its specific rule of law would be furthered by applying that rule to the facts before the court. If it is the only state with such an interest, there is a false conflict and its law should be applied. To fail to do so would be a gratuitous insult if the interested state is not the forum state.¹¹¹ Implicit in category (B)(1) is the proposition that full faith and credit principles *require* that only the law of the interested state be applied if it is the nonforum state. *Clapper* was and still is authority for this proposition, despite the disparaging remarks about *Clapper* in the *Carroll* opinion.

The majority in *Carroll* said that *Pacific Employers* had “de-

¹⁰⁸ See text describing categories (B) and (C) *supra*.

¹⁰⁹ See text accompanying note 84 *supra*. See also Cheatham, *supra* note 44, at 593; Leflar, *supra* note 44, at 719-20. One can infer from *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119, 126 (1927), that a distorted characterization of a sister-state exemplary damage statute as penal would be proscribed on this basis. Cf. Leathers, *supra* note 103, at 25-26.

¹¹⁰ The “choice-of-law revolution” presents some problems in this connection. The new learning is not always clearly understood. As a result, courts attempting to apply interest analysis sometimes apply the rules of the RESTATEMENT (SECOND) instead, or simply fail to realize that analysis of substantive law and policy, and not just of the state’s “interest” in the transaction or in the parties, is an essential step in interest analysis. See, e.g., *Commercial Union Ins. Co. v. Upjohn Co.*, 409 F. Supp. 453 (W.D. La. 1976); *Simkins Indus., Inc. v. Fuld & Co.*, 392 F. Supp. 126 (E.D. Pa. 1975). Such cases would not violate the “blatant manipulation” full faith and credit principle if, given the benefit of the doubt, they simply involve a good faith, but misguided, attempt to apply the new learning. The defiance of federalism would be missing.

¹¹¹ If the forum fails to apply its own law when it is the only interested state, there is no gratuitous insult to a sister state and therefore no full faith and credit violation.

parted" from *Clapper*.¹¹² The *Pacific Employers* Court noted that *Clapper* decided only that a workmen's compensation act of the employment state will be given full faith and credit in the injury state, "when not obnoxious to its policy."¹¹³ But *Clapper* talked about the policy of the state of injury in two quite distinct senses, without making the distinction clear—at least not to the majority in *Carroll*. At one point the *Clapper* Court used the term traditionally, referring to the public policy escape device recognized by the vested rights,¹¹⁴ first *Restatement of the Conflicts of Laws* approach.¹¹⁵ It indicated that this escape device could not be used to defeat a substantive defense created by the applicable law of another state.¹¹⁶ It then used "policy" in a different, more modern sense. It said, in effect, that on the specific facts before it—the electrocution and death on the spot of a workman from another state who had crossed the state line for the most temporary of purposes and who left no dependents—New Hampshire's policy of providing compensation through a wrongful death remedy would not be furthered by applying that remedy.¹¹⁷ It was, in other words, a noninterested, or "casually" interested, state.

The *Pacific Employers* decision apparently referred only to this second "policy" aspect of *Clapper*. Although the language in *Pacific Employers* does not make this explicit, the Court cited only the portion of the *Clapper* opinion using "policy" in this interest-analysis sense.¹¹⁸ Moreover, in interest-analysis terms, *Pacific Employers* is easily distinguishable since the employee was in California (the state of injury) for a longer time, thus arguably increasing California's "interest" in applying its own law, and was given medical care by Californians who had statutory liens against the California workmen's compensation proceeds. Thus it is difficult to see how *Pacific Employers* "departed" from *Clapper*.¹¹⁹

¹¹² *Carroll v. Lanza*, 349 U.S. 408, 412 (1955). See text accompanying note 76 *supra*.

¹¹³ *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493, 504 (1939). See text accompanying note 74 *supra*.

¹¹⁴ See 3 J. BEALE, *THE CONFLICT OF LAWS* 1647-51 (1935).

¹¹⁵ *RESTATEMENT OF CONFLICT OF LAWS* § 612 (1934).

¹¹⁶ *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160 (1932).

¹¹⁷ *Id.* at 161-62.

¹¹⁸ The citation was to *Bradford Elec. Light Co. v. Clapper*, 286 U.S. at 161.

¹¹⁹ *Pacific Employers* is not the only case in which the Court has correctly distinguished *Clapper* without clearly pointing out by difference between forum nominterest in *Clapper* and the forum interest in the case before it. In *Griffin v. McCoach*, 313 U.S. 498 (1941), the Court repeated its *Pacific Employers* characterization of *Clapper* while holding that Texas could apply its own law requiring that life insurance beneficiaries have an insurable interest in the life of the insured. The Texas policy was to protect the insured "against the

There were neither medical creditors nor dependents in Arkansas (the state of injury) in *Carroll*. But Carroll, the injured employee, had a far more sustained relationship with Arkansas than Clapper had with New Hampshire. He was the foreman for a subcontractor doing all the painting required by defendant Lanza's prime contract to construct the Bull Shoals Dam in Arkansas, a few miles from the Missouri border. The subcontract was made a little more than a year before Carroll's injury.¹²⁰ The lower court opinion reveals that Carroll himself was involved with the phase of the project that resulted in his injury for two months before the accident occurred.¹²¹ Since he was a foreman, one assumes that he was at the Arkansas job site regularly from shortly after the subcontract was entered into until his injury. Whether he lived at the job site or commuted the few miles each day from Missouri is not made clear in the opinion.¹²² In either case, it is certainly plausible to conclude that his work relationship with Arkansas had reached the point at which Arkansas would have an interest in effectuating the compensatory policy underlying its rule permitting supplementation of workmen's compensation benefits by an action against a general contractor.

If the Supreme Court majority had focused on these facts, *Clapper* could have been distinguished and there would have been no need to rely on the erroneous assumption that *Pacific Employers* had weakened the *Clapper* holding. If one considers the result in *Carroll* rather than the Court's dicta, the *Clapper* principle remains intact. Even if we take account only of what the Court said, only a minor caveat is cast over the *Clapper* principle. The majority in *Carroll* recognized that in the usual case, the state of injury will have an interest in applying its compensatory law to protect its medical creditors or dependents, though the Court failed to recognize that there was also an independent interest in protecting the employee in the case before it. The majority stressed that the opinion was being written for the *type* of case in which the state of

assumed dangers of insurance on their lives held by strangers." *Id.* at 507. Since the insured in *Griffin* was a Texan, Texas had a clear interest in the effectuation of its policy.

¹²⁰ See *Carroll v. Lanza*, 116 F. Supp. 491, 494, 498 (W.D. Ark. 1953).

¹²¹ The fullest statement of facts appears in the district court's opinion; see *id.* at 494-99.

¹²² It does appear that the injured employee eventually was taken to a hospital in Springfield, Missouri—a distance of more than 50 miles from the job site. *Id.* at 498-99. If he was taken there to be close to home, he lived too far from the job to have commuted conveniently. On the other hand, his injury was serious and Springfield may have been the closest city with adequate hospital facilities.

injury does have a potential, if not actual interest.¹²³ The *Clapper* principle survives whenever the forum does not have an interest in applying its own law to the specific facts and a court elects to decide only the precise case presented.¹²⁴

Carroll and *Pacific Employers* might suggest that in the case of a true conflict, the "overwhelmingly interested state" principle would never apply. But *Broderick* seems to have been a true conflict in which the Supreme Court would have required deference to the nonforum state's law if that question had been squarely presented.

In *Broderick*, the New Jersey forum-closing law was apparently designed to protect New Jersey stockholders from liability beyond the purchase price of their shares.¹²⁵ New Jersey had an interest in applying its policy in an action involving New Jersey stockholder-defendants, even though the potential liabilities of individual stockholders were relatively slight.¹²⁶ But New York also had an interest in applying its law: The insolvent bank was not only incorporated in New York, but all its business offices were located there. It is very likely that the great majority of its 400,000 depositors and creditors were New Yorkers, and New York law protected the depositors and creditors by authorizing stockholder assessments. Moreover, it is highly probable that the great bulk of the bank's stockholders were New Yorkers.¹²⁷ New York not only had an interest in applying its law, it had the overriding interest in providing an orderly scheme for the delicate business of winding up the affairs of the New York-incorporated, New York-centered, insolvent bank. The Supreme Court clearly indicated that under the circumstances New Jersey would have been required by full faith and credit to apply New York law on the merits.¹²⁸

¹²³ See *Carroll v. Lanza*, 349 U.S. 408, 413 (1955).

¹²⁴ For a different argument suggesting *Clapper's* continuing viability, see R. WEINTRAUB, *supra* note 39, at 409-10. See also Currie, *supra* note 61, at 27, reprinted in B. CURRIE, *supra* note 9, at 210, arguing that *Clapper* presented a false conflict because the New Hampshire wrongful death statute provided no fund for local medical creditors, had there been any, and that there were no dependents. This would distinguish *Carroll*, since the type of remedy involved there (for injury, not for wrongful death) would provide a fund for local medical creditors if any existed.

¹²⁵ See Currie, *supra* note 61, at 287-90, reprinted in B. CURRIE, *supra* note 9, at 345-47.

¹²⁶ The potential liability of some defendants was only \$50. *Broderick v. Rosner*, 294 U.S. 629, 640 (1935).

¹²⁷ Only 557 out of 20,843 lived in New Jersey. *Id.* at 638, 640.

¹²⁸ *Id.* at 647. See text accompanying note 83 *supra*. Specifically, the Court indicated that New Jersey could not use the public policy escape device to avoid application of New York statutory liability. Since any such use of the escape device would have been tantamount to choice of New Jersey law on the merits, that too would have been precluded.

To summarize, the requirements of federalism demand that the forum not be so provincial as to apply its own law in the face of an overwhelming interest of another state. The clearest case is the false conflict, when the forum is the noninterested state.¹²⁹ A similar example is the truly disinterested forum, which should not be allowed to apply its own law rather than that of an interested state, unless its law is just being used as a surrogate for the substantially identical law of an interested state.¹³⁰ But the principle would extend also to a small number of true conflicts, when it can confidently and objectively be said that the nonforum state not only has an interest in applying its own rule, but has a concern with the matter that unquestionably transcends the concern of the forum.¹³¹ Such a concern would not normally arise solely on the basis of traditional contacts, and would not be ascertained by a weighing test in any but the most lopsided sense.¹³²

Category (B)(2)¹³³ reflects the *Wolfe* decision and the other

¹²⁹ A noninterested forum is one with an arguable basis for applying its own law under some recognized choice-of-law approach, but which has no interest in effectuating the policies reflected in its rule on the specific facts of the case. Such a forum is to be distinguished from a disinterested forum, which is one that is truly neutral as to the outcome and would have no basis for applying its own law, except possibly as a last resort if no other choice makes sense.

In the "unprovided-for case," in which no state is interested, the forum could apply its own law in the absence of some constitutional prohibition unrelated to overwhelming state interest.

¹³⁰ See Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 780 (1963). The forum's interest in a case must be analyzed with respect to the specific choice-of-law issue. Thus if the choice-of-law issue relates directly to judicial administration (e.g., choice of the applicable statute of limitations, if the forum period is the shorter of the two), the forum would be interested even though it might be a disinterested (or noninterested) forum on the merits.

¹³¹ But see *Richards v. United States*, 369 U.S. 1, 15 (1962) (dictum) (troublesome on this point, as is its choice-of-law outcome). The dictum makes it appear that a forum could apply its own law even if another state were clearly more interested. On the facts, however, the forum applied the law of a third state. When the forum applies another state's law, it is difficult to imagine that the full faith and credit antiprovincialism policy would ever interfere. See note 111 *supra*. Moreover, it is clear from the manner and context in which the Court used the "state interest" terminology that it did not clearly focus on interest analysis. See note 39 *supra*. The result, however, can be supported under the constitutional tests proposed in this Article. See note 179 *infra*.

¹³² In addition, the principle probably should not be applied when the issue is only incidental to the main dispute, since the insult to the sister state ordinarily would be slight. In *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487 (1941), the Supreme Court held that full faith and credit did not require choice of the otherwise applicable law to determine whether interest was payable on an award of contract damages, because interest was simply "an incidental item of damages . . ." *Id.* at 498.

¹³³ See Part II D *supra*.

fraternal benefit society cases. The Court felt that because of the complex quasi-governmental structure of those societies, all significant questions arising under their constitutions had to be decided under one bellwether law—the law of incorporation.¹³⁴ This principle is clear and easily comprehended. The troublesome question is whether it might apply to cases not involving fraternal benefit societies. One possible explanation of *Broderick* suggests that it does. That case could be viewed as deciding that the need to look to one state's law to resolve the problems of insolvency is so great that full faith and credit requires obeisance to the state of incorporation, when that is also the principal place of business.¹³⁵

Category (C)¹³⁶ is also suggested by *Wolfe*, although the non-divisible "legislative" scheme in that case was actually the benefit society's constitutional scheme enacted under authority granted by the state of incorporation.¹³⁷ When the Supreme Court said that if a state gives *some* faith and credit to the public acts of another state it must give *full* faith and credit to them,¹³⁸ it was referring to the case in which application of forum law to a portion of the "legislative" scheme would distort a closely interdependent whole in a manner not achievable under forum or nonforum law alone.

Dépeçage, of course, can be practiced when it does not disrupt a unified legislative scheme. For example, a court applying New York choice-of-law rules could permit an action nominally under the former Massachusetts wrongful death act without its damage limitation, when to do so would produce a result constitutionally attainable under New York law alone.¹³⁹ Statutory venue provisions normally would not be severable from their correlative stat-

¹³⁴ Professor Weintraub suggests that the fraternal benefit cases may have misjudged the need for national uniformity. R. WEINTRAUB, *supra* note 39, at 410-11. He notes, however, that the full faith and credit clause does impose a national uniformity limitation not found in the due process clause. *Id.* at 410. Professor Horowitz would apply the commerce clause when national uniformity is important. Horowitz, *supra* note 3, at 814-21.

¹³⁵ *Cf.* Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 635 (1947) (Black, J., dissenting opinion); note 89 *supra*. There is some indication that the framers were concerned with insolvency acts when they included "public Acts" in the full faith and credit clause. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 447 (M. Farrand ed. 1911).

¹³⁶ See Part II D *supra*.

¹³⁷ See Order of United Commercial Travelers v. Wolfe, 331 U.S. 584, 637 (1947) (Black, J., dissenting opinion); note 89 *supra*.

¹³⁸ See text accompanying note 91 *supra*.

¹³⁹ See Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

utory rights.¹⁴⁰ The same would be true of an exclusive administrative remedy in a workmen's compensation act, although the case establishing this principle is hardly a model of judicial analysis.¹⁴¹ An example of a case that would fall within the "interdependent statutory scheme" aspect of *Wolfe* appears in Part III below.

None of the leading cases upholding application of forum law against full faith and credit attack—*Alaska Packers*, *Pacific Employers*, *Carroll*, and *Watson*—would be affected by any of the limiting categories outlined above.

III

SOME EXAMPLES

(1) Professor Martin poses a hypothetical based on *Watson*: Insurance companies expressly exclude Louisiana from coverage in their insurance contracts for the nationwide sale of goods. Louisiana then enacts a statute negating that contractual exclusion for insurance companies doing business in Louisiana, and notifies the companies of its new statute. Another *Watson* case arises, in which Louisiana applies both its new statute and its direct-action statute against the company. Professor Martin concludes that Louisiana could not constitutionally do so, because full faith and credit would require deference to the interests of the states where the insurance contracts were made and where the product manufacturers have their business headquarters.¹⁴² I agree that Louisiana could not constitutionally proceed in this manner, but the barrier is due process, not full faith and credit. Despite the occurrence of the injury in the forum (a circumstance that should satisfy the power rationale), the fairness requirement is not met. The contractual relationship which Louisiana hypothetically tried to alter expressly excluded coverage there. Because Louisiana coverage was ex-

¹⁴⁰ *Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354 (1914).

¹⁴¹ See *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965). Mr. Justice Douglas, who also wrote the careless opinion in *Carroll*, relied on a sloppy reading of *Alaska Packers* and *Pacific Employers* in holding that an Alabama court could apply the Georgia workmen's compensation scheme although Georgia had created a compensation board specifically to administer the scheme. *Id.* at 40-43. The Supreme Court need not have decided the constitutional issue, since Alabama law precluded Alabama courts from splitting the Georgia claim from the exclusive Georgia remedy. See *Crider v. Zurich Ins. Co.*, 348 F.2d 211, 214-15 (5th Cir. 1965), *cert. denied*, 382 U.S. 1000 (1966).

¹⁴² Martin, *supra* note 1, at 210-11, 228.

cluded, the insurer derived no benefit in the form of premiums attributable to Louisiana and suffered some competitive disadvantage. It would be manifestly unfair to apply the Louisiana law because no exchange of benefit for burden existed.¹⁴³

Under the hypothesized facts, the only possible full faith and credit argument would be that the interests of the other states were overwhelming. But in this true conflict between Louisiana's interest in protecting its injured resident and the other states' interests in protecting the businesses centered there (and possibly in seeing that the integrity of contracts made there is maintained), it is highly implausible to say that the interests of any state or states are so unquestionably predominant that they must prevail.

(2) Professor Martin also focuses on the New York no-fault insurance law. It provides that every insurer authorized to do business in New York must include in all its automobile policies, issued in the United States or Canada, a clause providing no-fault coverage up to \$50,000 for accidents in New York, and every such policy is to be construed as if it contained that coverage.¹⁴⁴ Because the New York no-fault law is drawn to cover all automobile accidents in New York regardless of the residence or domicile of the parties, this provision would apply even to a policy issued in a fault-liability state to a resident of that state, if the insurer also does business in New York.¹⁴⁵ Professor Martin believes that this statute, like the hypothetical Louisiana statute discussed above, violates full faith and credit, since the insurance policies have minimal New York contacts and the balance of state interests tips against New York.¹⁴⁶

This analysis again falls into the trap of elevating a vague interest-weighting test to constitutional heights when reasonable people might well differ as to the weights to be attached to the interests involved. New York clearly does have an interest in applying its no-fault law to New York accidents involving nonresident motorists. Among the policies underlying New York's law are the decongestion of its courts through drastic reduction of automobile accident litigation, and the speedy provision of funds needed for

¹⁴³ A court deciding such a case would then have to consider the question avoided by the majority in *Watson*—whether Louisiana could impose its new law as a condition to doing business in Louisiana. See *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 73-74 (1954).

¹⁴⁴ N.Y. INS. LAW § 676 (McKinney Supp. 1976).

¹⁴⁵ For criticism of the territoriality aspect of the New York statute, see Kozyris, *No-Fault Automobile Insurance and the Conflict of Laws—Cutting the Gordian Knot Home-Style*, 1972 DUKE L.J. 331, 367-73.

¹⁴⁶ Martin, *supra* note 1, at 228-29.

medical care.¹⁴⁷ New York has a clear interest in applying those governmental policies to all accidents in New York, since any resulting litigation would be likely to occur there and any medical creditors would probably be New Yorkers. Moreover, New York has an essentially nondiscriminatory policy of treating all persons injured in automobile accidents in the state alike.¹⁴⁸ That policy applies regardless of the person's residence and regardless of where the insurance was issued. Who is to say, as a matter of constitutional dogma, that these New York interests pale beside those of the state of the motorist's residence and of the insurance contract's issuance?

The New York scheme would seem also to withstand due process attack. As in the case of the Louisiana hypothetical, the occurrence of the accident in New York would satisfy the power rationale. But unless the out-of-state insurance contract expressly excludes New York coverage, the insurer is receiving a benefit attributable to New York by being able to charge for coverage broad enough to protect the insured in all his peregrinations in New York and elsewhere. The only exception might be the case of an accident in New York before the insurer had a chance to adjust its premium to take account of the New York law, but the time lag between enactment and effective date of the law would have solved this problem.¹⁴⁹ As in *Watson*, there would be no need to rely on the right of New York to attach conditions to doing business in the state.

(3) Contrast the position of the Canadian insurance companies in the Cuban insurance cases. Typically, the companies issued life insurance policies through their Havana offices to Cuban residents before the Castro revolution. Most of the policies were payable in United States dollars though some were payable from the beginning in Cuban pesos. In any event, the dollar policies were converted into peso policies by a 1951 Cuban decree.¹⁵⁰ In some instances the policies provided that the proceeds were payable in Havana, and in some instances in a designated place in the

¹⁴⁷ See N.Y. INS. DEP'T, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? 22, 75-76, 123 (1970). Before no-fault, about half the civil actions filed in the New York courts stemmed from automobile accidents. *Id.* at 75.

¹⁴⁸ *Id.* at 98-99.

¹⁴⁹ The law was enacted in February 1973, with § 676 effective on February 1, 1974. N.Y. INS. LAW § 670 note (McKinney Supp. 1976). See Comment, *New York Adopts No-Fault: A Summary and Analysis*, 37 ALBANY L. REV. 662, 670 (1973).

¹⁵⁰ See J. GOLD, THE CUBAN INSURANCE CASES AND THE ARTICLES OF THE FUND 3-4, 36 (1966).

United States. After the 1951 decree, premiums were generally paid in pesos and the companies kept their reserves attributable to the policies in pesos in Havana. Following the Castro takeover, many of the insureds and their beneficiaries fled to the United States and sued the companies for the cash surrender values of the policies in dollars. The insurers defended on the ground that Cuban law applied. Under that law insurers were obligated only to pay the face amounts in pesos, and since Cuban exchange control regulations prevented them from remitting their peso reserves to persons outside Cuba, they were either excused from performance or were obligated only to pay the pesos in Havana.¹⁵¹

Although some of the earlier cases turned on whether the original obligation was to pay the insurance proceeds in the United States or in Cuba (applying Cuban law only in the latter instance),¹⁵² more recently it has been held that Cuban law would not be applied, and payment of the full cash surrender value in dollars would be required, even on a policy payable in Havana, if it originally specified payment in dollars.¹⁵³ This result has obtained even when the insured never left Cuba for the United States.¹⁵⁴ Application of the law of the American forum in the latter case would seem to violate due process. Although the power rationale might be satisfied if the insurer had been doing business in the forum all along,¹⁵⁵ the fairness standard is difficult to meet. The insurance companies kept reserves in pesos in Havana to meet their liabilities on the policies payable there, and the premiums and proceeds were payable in pesos under a law enacted by Cuba to

¹⁵¹ See *id.* at 1-20.

¹⁵² Compare *Theye y Ajuria v. Pan American Life Ins. Co.*, 245 La. 755, 161 So. 2d 70, *cert. denied*, 377 U.S. 997 (1964), with *Confederation Life Ass'n v. Ugalde*, 164 So. 2d 1 (Fla.), *cert. denied*, 379 U.S. 915 (1964); *cf.* *Confederation Life Ass'n v. Vega y Arminan*, 207 So. 2d 33 (Fla. App.), *cert. denied*, 393 U.S. 980 (1968) (Cuban law avoided by finding acceptance of "offer" to pay cash surrender value after insured had fled from Cuba to Florida). See also *Pan American Life Ins. Co. v. Blanco*, 362 F.2d 167 (5th Cir. 1966).

¹⁵³ *de Lara v. Confederation Life Ass'n*, 257 So. 2d 42 (Fla. 1971), *cert. denied*, 409 U.S. 953 (1972). *Contra*, *Johansen v. Confederation Life Ass'n*, 447 F.2d 175 (2d Cir. 1971); *cf.* *Santovenia v. Confederation Life Ass'n*, 460 F.2d 805 (5th Cir. 1972) (applying Cuban law on ground that policy was payable in pesos, and premiums were paid in pesos, from time of issuance).

¹⁵⁴ *de Lara v. Confederation Life Ass'n*, 257 So. 2d 42 (Fla. 1971), *cert. denied*, 409 U.S. 953 (1972). The beneficiaries had settled in Florida.

The cases have rejected the argument that the act-of-state doctrine requires choice of Cuban law. See, e.g., *Johansen v. Confederation Life Ass'n*, 447 F.2d 175, 180 (2d Cir. 1971); *Pan American Life Ins. Co. v. Blanco*, 362 F.2d 167, 170 (5th Cir. 1966).

¹⁵⁵ Even this is questionable if the policy was not issued from an office in the United States and premiums were not paid here.

govern these essentially local Cuban insurance policies. When the policies were issued, it was not foreseeable that the Cuban policyholders or their Cuban beneficiaries would ever move to the United States. Thus the insurers could not reasonably foresee ever receiving benefits related to the transaction from the United States; if the insured never did come to the United States, the insurers never derived actual benefits from any United States source.¹⁵⁶ Such cases are analogous to *Dick*.¹⁵⁷

(4) In *Bournias v. Atlantic Maritime Co.*,¹⁵⁸ an American court sitting in admiralty applied its laches rule to permit a Panamanian seaman to sue for benefits under the Panamanian Labor Code. These benefits were payable when the seaman's ship was transferred by its British owner from Panamanian to Honduran registry; the suit would have been barred by the one-year statute of limitations in the Panamanian Code. No American parties were involved, but the ship had made frequent calls at United States ports.¹⁵⁹ For purposes of satisfying the due process power rationale, the question is whether these calls were sufficiently connected with the claim so that the forum had something to grasp in applying its own laches rule.¹⁶⁰ In light of the strong tendency in the United States to treat claims as transitory, there probably would be sufficient connection between the frequent calls and the claim of a right to

¹⁵⁶ Justices Brennan and Douglas dissented from the Supreme Court's denial of certiorari in *de Lara*, arguing (though not explicitly by reference to a benefits test) that a forceful due process case had been made. *Confederation Life Ins. Co. v. de Lara*, 409 U.S. 953, 954-56 (1972).

The old refrain that one state will not enforce the revenue laws of another, even if still viable, should not be used in these cases to avoid the due process issue. It is clear in a case like *de Lara* that the forum is choosing its own law on the merits of a private dispute, and not simply declining to lend its assistance to the efforts of another sovereign to collect revenue for its Treasury. Compare *Banco do Brasil, S.A. v. A. C. Israel Commodity Co.*, 12 N.Y.2d 371, 377, 190 N.E.2d 235, 237, 239 N.Y.S.2d 872, 875 (1963), *cert. denied*, 376 U.S. 906 (1964), with *Banco Frances e Brasileiro, S.A. v. Doe*, 36 N.Y.2d 592, 596-99, 331 N.E.2d 502, 505-07, 370 N.Y.S.2d 534, 537-40 (1975).

¹⁵⁷ Cf. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); *Recaman v. Barish*, 408 F. Supp. 1189 (E.D. Pa. 1975) (lack of subject matter jurisdiction under securities laws as to sales of nonregistered securities outside United States to foreigners; no contacts with U.S. and no benefits derived from U.S.).

¹⁵⁸ 220 F.2d 152 (2d Cir. 1955).

¹⁵⁹ *Bournias v. Atlantic Maritime Co.*, 117 F. Supp. 864, 868 (S.D.N.Y. 1954), *rev'd*, 220 F.2d 152 (2d Cir. 1955).

¹⁶⁰ The due process power test should be applied to the specific issue at hand. See text accompanying note 36 *supra*. Thus, the question here is whether the contacts are connected with the right to be heard in the forum (the laches-statute of limitations issue), not whether they are connected with the claim on the merits. There might be sufficient contacts to apply the forum's longer limitation, but not to apply forum law on the merits.

have an American admiralty court hear a case arising from the seaman's relationship with the ship. The benefit test for fairness probably would also be satisfied, since the shipowner received material benefits from the seaman's services in United States ports and from the port facilities themselves.¹⁶¹

No full faith and credit question would arise in *Bournias*, since no other state of the United States was involved.¹⁶² The same case could not arise with a state of the United States substituted for Panama, since vessels of the sort involved in *Bournias* have national, not state registry. But imagine a similar case involving a Florida nonmaritime employee of a Florida employer claiming benefits under a Florida employee benefit statute in an action brought in New York. The action would be barred by the Florida statute of limitations, although permitted within the longer New York period. Even if the due process tests could be met, applying the New York limitation would violate full faith and credit. New York has no interest in hearing the case; Florida has an interest in seeing its policy of protecting its employers from stale labor claims applied to the case. Since Florida has the overwhelming interest, full faith and credit must be given to its short statute of limitations. Had the New York statute been shorter than Florida's, New York could apply it without denying full faith and credit to the Florida statute, since New York would then be effectuating the administration of justice in its courts by relieving them of stale claims.¹⁶³

(5) In *Gillies v. Aeronaves de Mexico, S. A.*,¹⁶⁴ the court held on nonconstitutional grounds that the forum should apply the shorter foreign statute of limitations in an action against the Mexican national airline, brought by a former employee who was a forum domiciliary and whose employment for the airline had placed him in the forum. The action alleged wrongful discharge and sought reparations which, under Mexican law, were measured by the employee's wage rate and length of service. The Mexican cause of action lapsed under Mexican law two months after the day of discharge. It seems clear that the due process power and fairness tests could be met if the forum applied its own longer statute of limita-

¹⁶¹ The analysis does not rely on the *Dick* distinction between foreign statutory limitations and foreign contractual limitations. That distinction is of dubious current significance. See note 48 *supra*.

¹⁶² Professor Martin would apparently apply a full faith and credit test, by analogy, to this as well as to other international conflicts cases. See Martin, *supra* note 1, at 196, 223.

¹⁶³ Accord, Martin, *supra* note 1, at 223.

¹⁶⁴ 468 F.2d 281 (5th Cir. 1972), *cert. denied*, 410 U.S. 931 (1973).

tions. Suppose, however, that an American employee brings an action against an American employer under a statute (identical to the Mexican statute) of the state of the employer's principal place of business. Suppose also that no similar right of action exists under forum law, although the forum has a general statute of limitations which would not bar the action. Because the two-month limitation period specifically qualifies a special right uniquely created for a limited class of persons, the forum should be required by full faith and credit to apply it. It would grossly distort the nondivisible statutory scheme to enforce the statutory right without applying the limitation.¹⁶⁵ If the other state's legislative scheme had not been so clearly an integrated whole, or if the forum had an employee-protection scheme substantially the same as the other state's, there would be no full faith and credit problem.¹⁶⁶

(6) Illinois has used the public policy escape device to decline to hear suits brought against insurance companies under the Wisconsin direct-action statute, when the claims stem from Wisconsin accidents.¹⁶⁷ Full faith and credit objections were rejected in those cases, but at least one commentator has argued that Illinois was constitutionally required to hear the direct-action claims.¹⁶⁸ It seems clear, however, that Illinois was not denying a forum in the constitutionally relevant sense. Illinois would hear claims against tortfeasors arising out of Wisconsin accidents, absent a lack of personal jurisdiction or a legitimate application of forum non conveniens. Since either of the latter two grounds for dismissal would be permissible under recognized standards of judicial administration, the only arguable affront to Wisconsin is the failure to recognize its direct-action remedy. That is not sufficient to breach the full faith and credit outer barrier when Illinois does not bar tort actions arising from the Wisconsin occurrences. Neither *Hughes* nor any reasonable extension of it requires a state to honor a sister state's peculiar form of action or remedy, even if it would impose no

¹⁶⁵ *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963) presented a different situation. There the court ostensibly permitted suit under the Massachusetts wrongful death act, but did not apply the Massachusetts damage limitation or its culpability standard for measurement of damages. In effect, the court simply applied forum (New York) law, as it was constitutionally entitled to do on the facts.

¹⁶⁶ Under these facts, the forum could satisfy due process as well as full faith and credit objections if it simply applied its own employee-protection scheme.

¹⁶⁷ See *Reishus v. Maryland Cas. Co.*, 411 F.2d 776 (7th Cir. 1969); *Marchlik v. Coronet Ins. Co.*, 40 Ill. 2d 327, 239 N.E.2d 799 (1968).

¹⁶⁸ Leathers, *supra* note 103, at 14-16.

burden, as long as the forum provides its own nondiscriminatory form of action or remedy.

(7) In *Rosenthal v. Warren*,¹⁶⁹ a New Yorker had gone to a Boston hospital for an operation by a well-known Boston surgeon. The hospital drew about eight percent of its patients from New York and about one-third from outside Massachusetts. When the New York patient died shortly after surgery, his New York survivors brought a wrongful death action against the surgeon and hospital in a New York federal district court. The defendants interposed an affirmative defense based on the Massachusetts wrongful death damage limitation in force at the time of the operation. A partial summary judgment striking the defense was affirmed. In choosing New York law, the court relied on New York's interest, which it said clearly outweighed the "anachronistic" Massachusetts damage limitation, and gave some weight to the extraterritorial drawing power of the Boston surgeon and hospital.

Professor Martin considers the *Rosenthal* result unconstitutional on full faith and credit grounds, finding that Massachusetts' interest in protecting the surgeon and hospital through its damage limitation outweighed New York's interest in protecting New Yorkers through its unlimited damage rule.¹⁷⁰ Since he recognizes the interests of both states, his balance is struck on the basis of the Massachusetts contacts. At the outset, one wonders why the policies served by full faith and credit demand choice of Massachusetts law based on its contacts (as distinguished from the Massachusetts interest in protecting its doctor and hospital) in a true conflict situation. But since Massachusetts not only had a clear interest in applying its protective policy, but also was the locus of everything seemingly relevant to liability, application of New York's unlimited recovery law might be considered an intolerable slap in the face—just the sort of gratuitous insult the full faith and credit clause is designed to avoid. It is difficult, however, to ascertain when a combination of state interest and contacts will justifiably produce such indignation; in fact, given the steadily receding (now extinct) Massachusetts damage limitation, the affront to Massachusetts may not have been serious in *Rosenthal*.

The due process clause provides a more penetrating constitutional objection to *Rosenthal*. If state law should not reach out to supply a rule of decision without something to justify that exercise

¹⁶⁹ 475 F.2d 438 (2d Cir.), cert. denied, 414 U.S. 856 (1973).

¹⁷⁰ Martin, *supra* note 1, at 226-27.

of power (even in the absence of a gratuitous insult to another state), application of New York law in *Rosenthal* seems unjustified. Contacts become significant here, not because all of them were in Massachusetts, but because none were in New York. New York's only possible justification for applying its law rested on the worldwide reputation of the surgeon and the hospital's record of attracting patients from New York and elsewhere.¹⁷¹ Although those facts might indicate that the defendants received some benefits from New York (satisfying the due process fairness test), it is very doubtful that they establish a sufficient relationship with New York to justify the exercise of power inherent in application of New York law. The power rationale does not focus on the concerns of individual parties (as the fairness rationale does) nor on the specific concerns of other states (as full faith and credit does), but on the outer limits of state acquisitiveness—in the choice-of-law context, acquisitiveness regarding competence to supply a rule of decision. With no greater relationship between the defendants and New York than their unadvertised drawing power in the state, New York's proper reach probably had been exceeded.¹⁷²

(8) The California Supreme Court held in *People v. One 1953 Ford Victoria*¹⁷³ that an unusual California forfeiture law would not be applied against a Texas automobile mortgagee who had made a secured automobile loan in Texas in compliance with Texas legal requirements. The California statute required that the interest of a mortgagee would be forfeited if no character check of the mortgagor had been made at the time of the loan, and if the car were later seized for unlawfully transporting narcotics. Texas law did not impose an equivalent condition. The Texas mortgagee had inserted a provision in the mortgage prohibiting the mortgagor from removing the car from the county without the written consent of the mortgagee. Without consent, the mortgagor drove the car to California and was caught there transporting marijuana.

¹⁷¹ Apparently the hospital also raised funds in New York and elsewhere. 475 F.2d at 444. This seems too unrelated to the issue or to the circumstances of the case to be relevant.

¹⁷² In *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969), New York applied its own law to permit a New York automobile guest to recover from a New York host, although the accident and all the physical contacts occurred in Michigan. The domicile of the defendant was an adequate relationship with the forum to satisfy the power requirement. Since no material benefits were sought by the defendant in operating her car, the fairness test would require that she be aware of her New York relationship. Clearly she would have been.

¹⁷³ 48 Cal. 2d 595, 311 P.2d 480 (1957).

Although the court in *Ford Victoria* did not rest its decision on constitutional grounds, it is likely that any other result would have violated the due process clause. There was a sufficient contact with California—the marijuana was transported there—but it is questionable whether the Texas mortgagee could reasonably have expected to derive any material benefit from California sources. If the mortgagee could not reasonably have foreseen that the car would be driven to California and payments on the loan would be made from California, the benefit test would not be met. In any event, the harshness of the unique California forfeiture statute would have been so disproportionate to any anticipated California benefit that it would have been manifestly unfair to apply it against the Texas mortgagee.¹⁷⁴

(9) Contrast *Bernkrant v. Fowler*,¹⁷⁵ another California case applying nonforum law. One Granrud allegedly made an oral promise in Nevada to draft a will forgiving a debt owed by three Nevadans. Granrud may have been a Nevada resident when he made the promise, but he later died a resident and domiciliary of California. His will did not forgive the debt. Under California law the oral promise was unenforceable because of the statute of frauds; it was enforceable under Nevada law. The California Supreme Court applied Nevada law, though not on constitutional grounds.¹⁷⁶

Even if Granrud had clearly been a Nevada resident when he made the promise, California could have applied its own law. The power test was met because Granrud was a California domiciliary at the time of his death (the time at which the promise was to be executed). In terms of fairness, the promisees reasonably could have expected that a Nevada promisor might move to another state (especially adjacent California) from which the eventual benefit would arise upon his death. It is irrelevant that the benefit would not result from application of California law if the promisor failed to make the promised will. It would be fair to apply even the adverse California law if the promisees could reasonably have an-

¹⁷⁴ The California statute (CAL. HEALTH AND SAFETY CODE § 11620) was repealed shortly after the *Ford Victoria* decision. See CAL. STATS. 1959, c. 2085, § 5, at 4817. The statute's application in that case would not have denied full faith and credit to Texas law, since California's interest in applying its law would not have been overwhelmed by Texas's interest, and none of the other full faith and credit criteria would have applied.

¹⁷⁵ 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

¹⁷⁶ The court considered the case on the basis of "the reasonable expectations of the parties and the policy of the statute of frauds." 55 Cal. 2d 588, 597, 360 P.2d 906, 910, 12 Cal. Rptr. 266, 270 (1961).

anticipated that their debt would be forgiven by a person who might live in California when his last will would take effect. If they then failed to insure that the promise was in a form enforceable under California law, the unfavorable result (should California choose to apply its own law) would not rise to a due process violation.¹⁷⁷

(10) A similar due process case, but without the "benefit" element, is *Young v. Masci*.¹⁷⁸ A New Jersey resident lent his automobile in New Jersey, apparently with the tacit understanding that the car could be taken to New York. The borrower did drive it to New York, and negligently injured a New Yorker. New York statutory law made the owner liable under such circumstances, but New Jersey did not. The New Jersey court applied the New York statute, and the United States Supreme Court affirmed. Clearly the contact test was met, since the accident occurred in New York. Although the New Jersey owner did not enter into the transaction expecting any material benefit, he obviously could have foreseen that an accident might occur in New York, since he gave at least tacit permission to take the car there. Thus, both due process tests were met.

A full faith and credit problem would not be involved when the New Jersey court applied the only plausibly applicable law other than its own, since full faith and credit policy is not concerned with whatever gratuitous insult a state may deal itself by failing to apply its own law. Had the case involved a New York forum applying New York law, the due process issue would have remained the same and no full faith and credit violation would have resulted because of New York's strong interest in applying its owner liability statute to compensate the injured New Yorker.¹⁷⁹

¹⁷⁷ Nor would a full faith and credit violation arise, for the same reasons as in *Ford Victoria*. See note 174 *supra*.

¹⁷⁸ 289 U.S. 253 (1933).

¹⁷⁹ Cf. *Richards v. United States*, 369 U.S. 1 (1962). An action was brought in a federal district court in Oklahoma, arising out of a fatal crash in Missouri of a scheduled flight from Oklahoma to New York. The plaintiffs alleged that the Federal Aviation Agency had failed to enforce its aircraft maintenance rules at the airline's overhaul depot in Oklahoma. The Court interpreted the Federal Tort Claims Act in such a way that the Oklahoma place-of-wrong connecting factor was used, resulting in choice of Missouri law (which contained a wrongful death damage limitation benefiting the Government). Since the crash occurred in Missouri, the due process power rationale would not pose a problem. There is no indication that the government expected any material benefit from the flight, so the reasonably foreseeable contact test should be used to assess fairness. One should foresee that an aircraft might crash in any state on or near its normal flight pattern. Missouri would be such a state on a regularly scheduled Oklahoma-to-New York flight. Consequently due process would not pose a problem.

(11) A California Corporations Code provision¹⁸⁰ mandates choice of California law on a variety of internal corporate matters involving certain foreign corporations if the average of the property, payroll, and sales factors allocated to California for state tax purposes exceeds fifty percent for the previous year, and if more than half of the outstanding voting stock is held by Californians.¹⁸¹ The statute covers election and removal of directors, internal liability of directors, and shareholders' rights, including cumulative voting and rights of inspection. If this provision is applied to require a Delaware corporation meeting the California statutory conditions to adopt cumulative voting under California law (although Delaware law makes cumulative voting optional), would California deny full faith and credit to Delaware law?

California might violate two full faith and credit standards: the overwhelming interest standard, and the standard that requires a court to apply a bellwether state's law when there is an overwhelming reason to decide similar claims according to one legal system.¹⁸² The overwhelming interest objection is easily dismissed, because the California provision is framed to apply only to foreign corporations centered in California. Therefore, one cannot seriously argue that Delaware (or any other state) would have an overwhelmingly greater interest than California in applying its law.

The more difficult question is whether there is an overwhelming reason to decide the cumulative voting rights of all stockholders under one legal system, and if so, whether a state other than California is clearly the bellwether. It seems essential that voting rights of all stockholders in a single corporation be uniform. Unfairness and considerable confusion would result if some stockholders, relying on California law, could cumulate their votes while those in other states either could not do so or are uncertain of their rights. This has long been recognized under traditional choice-of-law rules, which looked to the state of incorporation not only as the state with the presumed power to regulate internal corporate mat-

Nor would full faith and credit be an impediment on the facts of the case, since the only choice was between Oklahoma (forum) law and Missouri law, with forum law losing out. *See* note 111 *supra*. Arguably, also, the requirement that full faith and credit "be given in each State" to the public acts of every other state, U.S. CONST. art. IV, § 1, would not apply when the choice-of-law rule is in a federal statute such as the Tort Claims Act.

¹⁸⁰ CAL. CORP. CODE § 2115 (West Supp. 1976). The provision became effective on Jan. 1, 1977). *Id.*

¹⁸¹ The statutory choice of California law does not apply to corporations listed on the New York or American Stock Exchange. *Id.* § 2115(e).

¹⁸² *See* Part II D *supra*.

ters, but as a clearly identifiable bellwether state.¹⁸³ The "state of incorporation" connecting factor produced uniform, predictable results in most cases.

It has been argued that the need for uniformity concerning stockholders' voting rights dictates that the state-of-incorporation rule should be required under full faith and credit, unless another state is its principal place of business and the situs of all, or nearly all, its activities.¹⁸⁴ Under that test, applying California law in the well-known *Western Airlines* case¹⁸⁵ would deny full faith and credit to the law of the state of incorporation.¹⁸⁶ Furthermore, applying California law to a Delaware corporation having only the California contacts required by the new statute would also be unconstitutional.

It is not clear why the state of incorporation must be the bellwether state when the business contacts and voting stockholders are centered in another state, as required by the new California Code provision. A single bellwether is required; nothing inherent in the full faith and credit policies of federalism would prevent a state clearly having the greatest interest in a corporation and in the rights of its stockholders from displacing the state where the incorporators chose to file the incorporation papers. Logically, those policies call for such a result, since a state meeting the conditions set forth in the new California Code—over half of the combined property, payroll, and sales, plus over half of the stockholders—may well have the overwhelming interest in regulating such matters as stockholder voting rights.

There are two possible rebuttals: First, the need for a bellwether implies the overriding need for certainty in determining which state will serve that function. The state-of-incorporation rule provides that certainty. Without it there will be borderline cases, since there is no guarantee that every state following California's lead will be as scrupulous in limiting its grasp to corporations in which it obviously has the overwhelming interest, and in some cases one might argue whether even the California test is met. Second,

¹⁸³ Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1124-27 (1958).

¹⁸⁴ *Id.* at 1141.

¹⁸⁵ *Western Air Lines, Inc. v. Sobieski*, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961) (applied then-existing California law to block a change in articles of a Delaware corporation that would have eliminated cumulative voting). More than half of Western's traffic was generated in California, sixty percent of its wages were paid there, and thirty percent of its stockholders were Californians. It did no business in Delaware.

¹⁸⁶ See Reese & Kaufman, *supra* note 183, at 1144.

even if some focus other than state of incorporation makes sense and avoids serious damage to principles of certainty, an instant switch to the new approach by all states will not occur. In the long interim, chaos will prevail with some states (including Delaware) looking to the state of incorporation and some looking to the state where the business and stockholder contacts are predominant. Thus it would arguably be better to retain the tried and true rule, and to solidify it under the full faith and credit clause.

There are a number of persuasive responses. First, even the supporters of a constitutionally required state-of-incorporation rule concede that it might not be required when virtually all the business is done in another state. Once one concedes that such an overwhelmingly interested state could be the bellwether, there is no reason to distinguish the case in which the corporation does not do all its business in one state, if a single state clearly has a greater interest than any other in regulating internal corporate affairs. Second, the loss of certainty is insubstantial in an approach that permits use of a non-incorporation state as the rulemaker only when that state can demonstrate its clearly greatest interest by a mechanically applied formula such as the dual-factor formula in the California Code. Third, there is little reason to cling to a one-dimensional bellwether (serving only the policy of certainty) when a new approach could serve other policies as well—particularly when it could give rulemaking authority regarding internal matters to the state with the greatest interest in resolving such matters. Moreover, it is doubtful that other states following California's approach will unjustifiably assert themselves to be the preponderantly interested state; if they do, the Supreme Court could thwart the effort by requiring that they give full faith and credit to the law of the overwhelmingly interested state, or if none, to the law of the state of incorporation.

Finally, although there would indeed be some uncertainty during any transition from rigid deference to the state of incorporation to the new regime, it is doubtful that serious problems would arise with any frequency. Most questions would be resolved simply, without litigation, by complying with the law of the overwhelmingly interested state, if such a state exists, and if it has asserted the authority to apply its law. If litigation occurs, it will often be in the courts of that state, whose judgments will be entitled to full faith and credit elsewhere as to the parties and those in privity with them. Even if the original litigation occurs elsewhere, many courts have departed from traditional, rigid choice-of-law rules. They

should be receptive to application of the law of the state having the overwhelming interest in resolving internal corporate affairs. If, on the particular facts, an overwhelmingly interested state is involved, then full faith and credit policies probably require this result.¹⁸⁷

In sum, the California provision does not appear to violate the full faith and credit clause, and may in fact express a right bestowed by that clause.

(12) Finally, let us consider the choice-of-law aspect of *Hanson v. Denckla*.¹⁸⁸ Dora Donner, then a Pennsylvania domiciliary, created a revocable inter vivos trust with a Delaware corporate trustee. The corpus consisted of stocks, bonds, and notes. Mrs. Donner reserved the income for life, with the remainder to be paid as she might appoint by deed or will. She retained the right to change trustees, and many of the trustee's powers could be exercised only with the consent of a trust advisor named by her. A few days after creating the trust, she exercised the power of appointment, which she amended in 1939. Mrs. Donner later moved to Florida, where in 1949 she revoked her earlier exercises of the power and substituted a new appointment calling for payment at her death of \$200,000 to each of two Delaware trusts previously created by one of her daughters, Mrs. Hanson, for Mrs. Hanson's children, and disposed of the remaining trust assets¹⁸⁹ according to the residuary clause of the will that Mrs. Donner executed separately the same day. The will left the residue to two other daughters and named Mrs. Hanson as the executrix. When Mrs. Donner died, the two other daughters petitioned a Florida chancery court for a decree declaring that the appointments to Mrs. Hanson's two Delaware trusts were invalid and that the \$400,000 ostensibly appointed to those trusts fell into the residue.

¹⁸⁷ See text accompanying notes 129-32 *supra*. The Delaware General Corporation Law, DEL. CODE tit. 8, § 121(b) (1975), provides: "Every corporation shall be governed by the provisions and be subject to the restrictions and liabilities contained in this chapter." This might be construed as a choice of Delaware statutory law for the internal affairs of a Delaware corporation. A Delaware court would be required to apply a Delaware statutory choice of law, unless it would be unconstitutional to do so. As I have argued, it would be unconstitutional to apply Delaware law when California (or some other state) overwhelmingly has the greatest interest. Another alternative would be to construe the quoted Delaware provision simply to mean that no Delaware corporation is governed (insofar as it is governed at all by Delaware law) by any other chapter of the Delaware Code. Of course, courts outside Delaware would not have to apply the Delaware statute to a California-centered corporation unless (contrary to the argument in the text) full faith and credit requires choice of the law of the state of incorporation.

¹⁸⁸ 357 U.S. 235 (1958).

¹⁸⁹ They were worth more than \$1,000,000. *Id.* at 239.

The chancery court held that it lacked jurisdiction over both Mrs. Donner's and Mrs. Hanson's Delaware trustees, since they had not been personally served and the trust corpus in each instance was in Delaware. It nevertheless decided that the trustees were not indispensable parties, and held that the \$400,000 passed into the residue because Mrs. Donner's exercise of the power of appointment in Florida was testamentary and had not met the requirements of the Florida statute of wills.¹⁹⁰ In the meantime, the executrix had initiated a parallel declaratory judgment action in Delaware. After the Florida decree had been entered, the Florida residuary legatees unsuccessfully urged that the Florida judgment was *res judicata* in the Delaware proceedings. The Delaware chancellor held that the Donner trust and the exercise of the power of appointment were valid under Delaware law.

Meanwhile, back in Florida, an appeal was taken to the Florida Supreme Court. The executrix, who had prevailed in the Delaware trial court, did not assert that full faith and credit was owed to the Delaware decree. The Florida Supreme Court held that valid jurisdiction in Florida had been obtained by constructive service on the Delaware trustees, and that the issue on the merits was the validity of the Donner trust—which depended on whether it had substance as an *inter vivos* transfer or whether the settlor's reserved rights were such that it should be treated as an attempted testamentary disposition subject to the applicable statute of wills.¹⁹¹ On the choice-of-law question, it held that Florida law should determine the trust's validity because

the last effective acts, if any there were, of the settlor to establish remainder interests under the trust were accomplished while she was a Florida domiciliary, and we consider the last powers of appointment as a republication of the original trust instrument, or as if the trust instrument had been executed while the settlor was domiciled in Florida.¹⁹²

¹⁹⁰ See *Hanson v. Denckla*, 100 So. 2d 378, 381 (Fla. 1956) (quotation from chancellor's conclusions).

¹⁹¹ There was confusion in the United States Supreme Court as to whether the Florida Supreme Court had treated the issue as the trust's validity or the validity of the exercise of the power. The majority read the Florida opinion as dealing with the former, while the dissent favored the latter interpretation. *Hanson v. Denckla*, 357 U.S. 235, 253, 256 n.1 (1958). Although the Florida chancery court may have treated the validity of the exercise of the power (see text accompanying note 190 *supra*), it is clear that the Florida Supreme Court considered the issue to be the validity of the trust itself. See *Hanson v. Denckla*, 100 So. 2d 378, 382-85 (Fla. 1956).

¹⁹² 100 So. 2d at 382.

Under the Florida statute of wills, the trust was invalid.

At that point the Delaware litigation had not run its course. After the Florida Supreme Court's decision, the Delaware Supreme Court affirmed the Delaware chancellor, holding that Delaware law determined the validity of the Donner trust, that it was valid under Delaware law, and that full faith and credit was not owed to the Florida judgment because the Florida courts lacked jurisdiction over both the Delaware trustees and the trust corpus.¹⁹³

Faced with this Florida-Delaware impasse, the United States Supreme Court in a five-to-four decision reversed the Florida judgment and held that Delaware was not required to give it full faith and credit, because the Florida courts lacked in rem jurisdiction over the Donner trust and in personam jurisdiction over the Delaware trustees. Moreover, the Delaware trustees were indispensable parties under Florida law so the Florida courts could not have proceeded validly without them. In so holding, the Court opened itself to considerable scholarly criticism, both as to its due process jurisdictional holding and as to its rather presumptuous determination of the purely state law question regarding indispensable parties.¹⁹⁴

Under its own jurisprudence, the Court could have avoided that criticism by upholding the Florida courts' jurisdiction, but striking down the Florida Supreme Court's unconstitutional use of Florida law to determine the validity of the Donner trust. That, however, would have raised a thorny dilemma for the Court, but for present purposes let us simply examine what it should have held had it reached the choice-of-law point.¹⁹⁵

Florida probably could satisfy the two-pronged due process test. The domicile of the settlor in Florida at the time of her death, and the resulting administration of her estate there, would satisfy the power test even though the issue was characterized as one of validity of the inter vivos trust. The value and composition of the assets in the estate depended on the resolution of that issue, thus

¹⁹³ *Lewis v. Hanson*, 36 Del. Ch. 235, 128 A.2d 819 (1957).

¹⁹⁴ See, e.g., Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 243-44; Kurland, *supra* note 5, at 610-23. Professor Scott, who approved of the jurisdictional holding in *Hanson*, had serious reservations about the propriety of determining the indispensable party issue. Scott, *Hanson v. Denckla*, 72 HARV. L. REV. 695, 705 (1959).

¹⁹⁵ The majority referred briefly to choice of law, saying that the Florida Supreme Court's "republication" theory "may be justified" for choice-of-law purposes, but that it would not provide a jurisdictional basis. 357 U.S. at 253. That is a lukewarm endorsement at best; it sounds more like an avoidance of the issue. Mr. Justice Black and two others thought that Florida could apply its own law. *Id.* at 258 (dissenting opinion).

giving Florida an adequate nexus to apply its statute of wills. The fairness test would also be met. The Delaware trustees were mere stakeholders. The original trustee had nothing further to do after it distributed the trust assets upon Mrs. Donner's death, and thus would not be adversely affected by the choice of Florida law. The trustee under Mrs. Hanson's trust did stand to lose commissions if the appointed property fell into the Florida residue, but it is questionable whether its purely fiduciary interest should be considered in applying the fairness test. The law everywhere treats the pecuniary interest of a fiduciary as subordinate to all beneficial interests, and those interests would not be treated unfairly in this case because of the beneficiaries' expectation of gain to be derived from Mrs. Donner, a Florida resident. In any event, when the Hanson trustee entered the picture, almost all the potential beneficiaries were Floridians. Any commissions the trustee might earn derived from the services it would perform for those persons.

Full faith and credit, however, is another matter. In particular, it seems that the Florida Supreme Court blatantly manipulated its characterization of the situation to apply its own law.¹⁹⁶ It did not purport to follow interest analysis or to devise any new choice-of-law method. Rather, it used the traditional process of characterization and application of a connecting factor. That approach, of course, remains widely used in matters involving trusts and wills. Under it, if the issue was validity of the trust,¹⁹⁷ almost all authorities would look to the validating law of the state where the settlor intended the trust to be administered, unless—perhaps—the settlor was trying to evade a strong protective policy for a designated class of persons in the common domicile of those persons and the settlor.¹⁹⁸ The Florida Court attempted to evade this by the fiction of treating Mrs. Donner's exercise of the power of appointment after she had moved to Florida¹⁹⁹ as a republication of

¹⁹⁶ See category (A)(2) *supra*.

¹⁹⁷ This is how the Florida court characterized the issue. 100 So. 2d at 382 (1956).

¹⁹⁸ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270(b), comments c & e, at 164-65, 167-68 (1971); A. EHRENZWEIG, CONFLICT OF LAWS § 244, at 643-44 (1962). Compare *Wyatt v. Fulrath*, 16 N.Y.2d 169, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965), and *Hutchison v. Ross*, 262 N.Y. 381, 187 N.E. 65 (1933), with *Estate of Clark*, 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968).

Under the first Restatement, current at the time of *Hanson*, the validity of the trust would be determined by the law of the place where the transaction took place. RESTATEMENT OF CONFLICT OF LAWS § 294(2) (1934). Mrs. Donner executed the trust agreement in Delaware. *Hanson v. Denckla*, 357 U.S. 235, 247 n.17 (1958).

¹⁹⁹ The court ultimately held that this exercise of the power did not have the effect of transferring anything. 100 So. 2d at 385.

the original trust instrument, so it could say the trust was created by a Florida domiciliary. That bootstrapping exercise certainly put the Florida Supreme Court in a class with the Georgia Supreme Court in *Yates*²⁰⁰ as a manipulator of choice-of-law rules.²⁰¹ The manipulation is made more evident by the fact that Florida would not fit within the arguable exception to choice of Delaware law even if Mrs. Donner and her daughters had been Florida domiciliaries all along, since the Florida law applied by the court was simply the statute of wills requiring certain formalities of execution, not a specific statutory policy protecting a favored class of Floridians.²⁰²

It is also arguable that there was an overwhelming reason to decide all questions of the validity of the trust according to one legal system, and that the state of trust administration provided the clear bellwether.²⁰³ Even though fewer people may be involved than in the usual case of questions involving internal corporate affairs, the need for uniformity in deciding the validity of interests in a trust seems at least as compelling as in the corporate situation. But as in that situation, it does not necessarily follow that the "constitutive state" (state of incorporation or state of trust administration) will be the bellwether, when all or a significant majority of

²⁰⁰ John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936). See text accompanying note 84 *supra*.

²⁰¹ The commentators are virtually unanimous that the Florida Court should have applied Delaware law, though most of them do not address the constitutional choice-of-law question. See Briggs, *Jurisdiction by Statute*, 24 OHIO ST. L.J. 223, 243 (1963) (Florida was "torturing the import of the exercise of the power of appointment by calling it a 'republication'"); Cleary, *The Length of the Long Arm*, 9 J. PUB. L. 293, 296 (1960); Kurland, *supra* note 194, at 620; Scott, *supra* note 194, at 699-700; von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1175 (1966) (Florida's choice of its own law was "extreme and virtually unsupportable").

²⁰² Even if the issue were characterized as validity of the exercise of the power, it would probably require a fiction to bring it within Florida law under the Florida choice-of-law approach. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 (1971), states that the formalities required to exercise a power over moveables in an inter vivos trust are valid if they comply with the law that determines validity of the trust—in this case, Delaware law under § 270(b). Under the first Restatement, validity of the power's exercise would be governed by Delaware law at least as to the bonds and notes (because the rights would be "embodied in the documents" and the documents were held by the trustee in Delaware). RESTATEMENT OF CONFLICT OF LAWS § 262 (1934); *cf. id.* § 286. The connecting factor for the appointment of corporate stock held by the trust may have been the state of incorporation. *Id.* § 182. But see *id.* § 294, comment f, and *Hanson v. Denckla*, 357 U.S. 235, 247 n.16 (1958), suggesting that the stocks should be treated the same as the bonds and notes. In any event, Delaware law would apply as to any Delaware corporation; it is highly unlikely that many Florida corporations were represented in the trust corpus.

²⁰³ See category (B)(2) *supra*.

those beneficially interested are domiciled in one other state. That was the case in *Hanson*, but only because some years after the trust was established the beneficiaries had moved to Florida. If the specific issue was validity of the trust itself, as characterized by the Florida Supreme Court, the bellwether test should apply as of the time the trust was created. If so, Florida denied full faith and credit to Delaware law under this standard as well as under the "grossly manipulative characterization" standard.

It might also be argued (tenuously) that Florida denied full faith and credit to Delaware law because of Delaware's overwhelming interest in overseeing the proper distribution of the trust assets.²⁰⁴ Delaware certainly has an interest in attracting trust assets and protecting its trusts and trustees through its liberal policy of upholding inter vivos trusts despite retention of income rights and considerable powers by settlors. But that interest is not so overwhelming by comparison with the interests of other states where the settlors and/or beneficiaries may reside to require all states to bow to it. Once again, the test becomes too unpredictable as a constitutional restriction on choice of law unless it is strictly reserved for the lopsided case.

To summarize, it appears that Florida denied full faith and credit to Delaware law, both because it evaded the choice of Delaware law mandated by faithful application of its professed choice-of-law method, and because it failed to look to Delaware as the clear bellwether for determining validity of the trust. Suppose, however, that Delaware were not considered the clear bellwether, because of the ultimate concentration in Florida of the settlor and major beneficiaries. Would Florida's tortured "republishing" theory still result in a denial of full faith and credit to Delaware law?

If Florida had simply applied interest analysis, it might have applied its own law without any manipulation. It presumably could find an interest in effectuating the policy of its statute of wills, which protected the estates of its domiciliaries from doubtful claims based on instruments not executed with sufficient formality either to demonstrate the decedent's seriousness of purpose or to establish the authenticity of the decedent's signature. That seems farfetched on the *Hanson* facts, but statutes of wills are typically

²⁰⁴ See category (B)(1) *supra*. This appears to be the argument in Briggs, *supra* note 201, at 246-49, 257, although it is not clear whether he considers this a due process or full faith and credit matter.

applied woodenly, and Florida's interpretation of its own statute of wills would be its own concern. The fact that Mrs. Donner (and presumably some or all of her daughters) moved to Florida after the trust was created poses additional problems for interest analysis, but probably should not defeat Florida's assertion of an interest; Mrs. Donner obviously was not forum shopping and the Florida interest in its decedents' estates applies to all who die domiciled there, even if they previously had executed trust instruments while domiciled elsewhere.

But the fact that Florida could have applied its own law under interest analysis should not change the full faith and credit result. Florida did not use interest analysis. Instead, it used a traditional characterization-connecting factor approach, and used it in such a way as to give another state a gratuitous slap in the face. It is the insult that matters. Full faith and credit tries to avoid that result, because it is concerned with the maintenance of interstate harmony in a federal system. It does not matter that the Florida Supreme Court indicated it favored a "domicile of the settlor" connecting factor,²⁰⁵ since that appears simply to have been an inseparable part of the effort to avoid Delaware law. The insult remains.

If the full faith and credit argument as to choice of law is so compelling, why did the Supreme Court elect instead to reverse the Florida decision on rather tenuous jurisdictional grounds coupled with an intrusion into Florida law regarding indispensable parties? The answer must be that it seemed the lesser of two dilemmas. The majority had little sympathy for the judicial gymnastics by which the Florida Supreme Court had managed to reach all the parties and the issues, or for the prevailing parties in the Florida proceedings.²⁰⁶ Mrs. Hanson had not argued in Florida that full faith and credit was owed to Delaware law.²⁰⁷ By deciding the

²⁰⁵ See *Hanson v. Denckla*, 100 So. 2d 378, 382 (Fla. 1956).

²⁰⁶ It was not essential to a determination of the legal issues to point out, as the majority did, that the residuary legatees—the Florida victors—had already received over \$500,000 each under Mrs. Donner's will, and sought to divide the remaining \$400,000 appointed to their nephews. See 357 U.S. at 240.

²⁰⁷ Mrs. Hanson did not argue that full faith and credit was owed to the Delaware chancery decree until she moved for a rehearing after the Florida Supreme Court's decision. *Hanson v. Denckla*, 357 U.S. 235, 242-43 (1958). This may have been due to her uncertainty as to the finality of a Delaware chancery decree pending its appeal. Review of such a decree in Delaware covers both fact and law, and one post-*Hanson* case has even characterized this appeal as a limited form of rehearing. *Nardo v. Nardo*, 58 Del. 400, 410, 209 A.2d 905, 911 (1965). See also *Sohland v. Baker*, 15 Del. Ch. 431, 444-45, 141 A. 277, 283 (1927).

matter on jurisdictional grounds, the Court avoided deciding whether a right intended primarily to protect the interests of federalism was waived by a private party at some time before direct review was completed.²⁰⁸

In addition, had the Court held that the Florida courts had jurisdiction but that they had denied full faith and credit to Delaware law, it would have faced the question of whether Delaware had failed to give full faith and credit to the constitutionally erroneous Florida determination.²⁰⁹

If the Court held that full faith and credit was not owed to a sister state judgment based on an unconstitutional choice of law, second-guessing and retaliation among states would have been the result. Presumably it would not wish to do that.²¹⁰ But that would necessitate a reversal of the Delaware Supreme Court's decision applying Delaware law in favor of Mrs. Hanson as a denial of full faith and credit to the Florida judgment, unless the Supreme Court held that the reviewable federal question raised by the Florida judgment created a narrow exception—so long as the possibility of direct review remained open—to the respect normally demanded of final determinations by sister states. Whether such an exception is desirable is not an easy question.²¹¹ If such an exception were not found, the reversal of the Delaware determination applying

²⁰⁸ Cases involving alleged denials of full faith and credit to judgments indicate that a waiver may result from failure to pursue all avenues of appellate review. See Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 802-11 (1969). Query if a waiver of a right based on a fundamental federal policy could exist while the avenues remain open?

²⁰⁹ The Court would have had to face this question, since the Delaware case was before it.

²¹⁰ Cf. *Sutton v. Leib*, 342 U.S. 402 (1952); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939) (required full faith and credit to judgments that have denied full faith and credit to prior judgments). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114, comment a at 329-30 (1971).

²¹¹ The decision of the Florida Supreme Court antedated the Delaware Supreme Court's decision. Full faith and credit would be owed to the Florida determination (which we now assume to have been free from jurisdictional defect) if the unconstitutional choice of Florida law or the possibility of the United States Supreme Court review did not stand in the way. The Delaware Supreme Court's decision was dated Jan. 14, 1957, but United States Supreme Court review of the Florida decision was not sought until April 17, 1957. See 25 U.S.L.W. 3322 (1957). Cases holding that full faith and credit is due to judgments that may have themselves denied full faith and credit to earlier judgments (see note 210 *supra*) have placed some emphasis on lack of diligence by the challenging party in pursuing all direct appellate remedies in the second proceeding. See Ginsburg, *supra* note 208, at 802-11, 831-32. This may suggest a relaxation while the direct remedies are diligently being pursued, but does it relieve the full faith and credit obligation while a further direct remedy (United States Supreme Court review) is possible but has not yet been sought?

Delaware law would be accompanied by a reversal of the Florida determination because it did *not* apply Delaware law (presumably with an instruction to the Florida courts to do what the Delaware courts improperly did)—an apparent anomaly that may have made the jurisdictional escape look attractive indeed. Moreover, the practical effect of reversing the Florida judgment on jurisdictional grounds and deciding that the trustees were indispensable parties (while affirming the Delaware judgment) was exactly the same as a determination that Delaware law had to be chosen, since the Florida courts on remand were obliged to give full faith and credit to the now-final Delaware judgment applying Delaware law.²¹² Perhaps the Court's madness had a method after all.

CONCLUSION

Due process and full faith and credit restrictions on choice of law necessarily leave considerable leeway for choice of forum law. But they do supply some meaningful limitations which can be defined with enough specificity to have predictive force for future cases. These two constitutional clauses serve interrelated but distinguishable purposes in choice of law: Due process combines a check on power excesses by individual states with a regard for fundamental fairness to those who stand to lose by the exercise of the power to choose the rule supplied by a given legal system, while full faith and credit looks after the functional legal requirements of a nonunitary (federal) national framework in which states must coexist in relative harmony. It is not always easy, of course, to determine when either clause should be applied to strike down a particular choice of law, but the difficulties can be relieved somewhat by the formulation and testing of standards reflecting the purposes of the clauses as they have been applied by the Supreme Court. A vague balancing standard is inadequate for the job. Hopefully, the more detailed standards I have proposed will provide a better alternative.

²¹² See *Hanson v. Denckla*, 357 U.S. 235, 261 (1958) (dissenting opinion). Of course, questions of nonfinality of the Delaware chancery decree were moot, and it is difficult to imagine that any waiver of the right to rely on that decree would extend to the Delaware Supreme Court's judgment as affirmed by the United States Supreme Court.